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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1160

GEORGE R. WHITTEN, JR., INC., doing business as WHITTEN CORPORATION,
PETITIONER,

v.

PADDOCK POOL BUILDERS, INC., PADDOCK POOL EQUIPMENT CO., INC., AND PADDOCK OF CALIFORNIA, INC.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOHN D. O'REILLY, JR.
St. Thomas More Drive
Brighton, Massachusetts 02135
Attorney for Petitioner

Of Counsel:
JOHN E. LECOMTE
FRANK T. BARBER, III
PETER A. DONOVAN
LECOMTE, SHEA & DANGORA
27 School Street
Boston, Massachusetts 02108

Blanchard Press, Inc., Boston, Mass. — Law Printers

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, George R. Whitten, Jr., Inc., prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on December 17, 1974 which appears in Appendix B hereto, *infra*, App. B, p. 60.

Citations to Opinions Below

The opinion of the United States District Court for the District of Massachusetts which entered judgment against Petitioner is reported in 376 F. Supp. 125 (D. Mass. 1974) and appears in Appendix A hereto, *infra,* App. A, p. 34. References to the District Court opinion appears as App. A, p.

The opinion of the United States Court of Appeals for the First Circuit which affirmed the judgment of the District Court is reported at —— F.2d —— (1st Cir. 1974), 5 CCH Trade Reg. Rep. Para. 75, 424, and appears as Appendix B hereto, *infra,* App. B, p. 60. References to the Court of Appeals opinion shall appear as App. B, p. For convenience, this opinion is sometimes referred to as *Whitten II.*

The opinion of the United States Court of Appeals in an earlier appeal is reported at 424 F.2d 25 (1st Cir. 1970) and appears hereto as Appendix C. References to this opinion appear as App. C, p. For convenience, this opinion is sometimes referred to as *Whitten I.*

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on December 17, 1974 (*infra,* App. B, p. 86). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

I. In the myriad of instances where Congress and the several states have enacted competitive bidding statutes to assure public buyers the benefit of competitive pricing opportunities, is the Sherman Act violated by the con-

spiracy and combination of business firms to deceive, induce and otherwise victimize architects into adopting model specifications drafted by the defendants in a manner calculated to exclude competing firms from the bidding process by qualifying only one of the defendants as the sole firm entitled to bid on a project required by law to be awarded on the basis of competitive bids?

II. Whether it is consistent with the purpose and provisions of the antitrust laws for business firms, acting in concert, to engage in "a variety of unfair business practices" [App. B, p. 80] in order to drive a competitor out of business and to eliminate all competition in the marketing of their product through the use of "an aggregation of dirty tricks" [App. B, p. 79] "distasteful efforts" "to influence by improper means" governmental officials and reports [App. B, p. 78], exclusionary specifications, and other anti-competitive conduct characterized by the Court of Appeals as "unethical" [App. B, p. 81], "immoral" [App. B, p. 85], "reprehensible" [App. B, p. 85] and, specifically, as "unfair competitive practices accompanied by an intent to hurt a competitor" [App. B, p. 84]?

III. Is it a per se violation of the Sherman Act for a company which first obtains a patent on a new product representing a major technological advance in a fragmented industry to combine and conspire with other business firms to drive a competitor out of business when the competitor subsequently obtains a patent on a competing substitute product?

Statutes Involved

The statutes involved in this Appeal are Sections 1 and 2 of the Sherman Act, 15 U.S.C., Sections 1, 2, and Section 4 of the Clayton Act, 15 U.S.C., Section 15. These are printed herein as Appendix D.

Statement of the Case

This is a private antitrust action for treble damages and injunctive relief commenced in August, 1968. Jurisdiction of the District Court was invoked under 15 U.S.C. Sections 15, 26, and 28 U.S.C. Section 1337.

A. *The Parties*

Plaintiff, George R. Whitten, Jr., Inc. (Whitten) is engaged in the manufacture and merchandising of a patented prefabricated metal recirculation system for use on swimming pools constructed principally by public agencies.

Defendants, Paddock of California, Inc., Paddock Pool Equipment Co., Inc. and Paddock Pool Builders, Inc., (collectively referred to as Paddock) are vertically affiliated corporations, under the control of their principal stockholder, William Baker. Paddock maintains a network of independent franchised dealers and representatives, approximately 30 in number, throughout the country. Paddock is also engaged in manufacturing and merchandising a patented prefabricated metal recirculation system for use on swimming pools constructed by public agencies.

B. *The Products*

Recirculation gutter systems rim the pool at the top of the pool shell and operate to remove water and contaminates from the pool. Water enters the gutter either through openings in the side of the gutter called skimming weirs (the Paddock system) or by overflowing the gutter lip (the Whitten system), and is then passed through a filter and chlorinator, and is returned after purification to the pool proper.

The majority of recirculation systems now in use are

termed "conventional systems". As the court of appeals recognized, conventional systems are not manufactured products. (App. B, p. 64). They may be constructed from, or adorned with, galvanized steel, precast stone, aluminum, gunnite, epoxy paint, ceramic tile, or concrete, poured, pneumatically applied, or constructed with masonry. Yet, each of these systems is "conventional" to the extent that each is constructed on site and utilizes buried perimeter piping. It is the use of such piping which defines a conventional system, and not the materials from which the system is fashioned nor the particular design. (App. B, p. 64, n. 5).

Both the Whitten and Paddock systems constitute a major technological advance in that both systems eliminate the necessity for buried perimeter piping. As a result, the useful life of both the Whitten and Paddock systems is two to three times greater than conventional systems, and costly maintenance is avoided. (App. B, p. 68).

Only Whitten and Paddock are actively engaged in the manufacture of prefabricated pipeless recirculation systems. (App. A, p. 56). In the last fifteen years the metal prefabricated pipeless recirculation gutters have entered the market and made significant inroads. (App. A, p. 36).

C. *Sales in the Market — Competitive Bid Requirements*

The market for both Whitten and Paddock is essentially limited to "public pools" (App. B, p. 63), since the respective recirculation systems of both parties are too expensive to compete successfully for use in most private swimming pools (App. B, p. 63). "Public pools" are those pools constructed for public bodies, in which public funds are used to procure the products, and sales to the public bodies are generally governed by statutory

competitive bidding requirements. (App. A, p. 40). For example, see *infra,* at p. 10.

Whitten and Paddock employ salesmen and manufacturers' representatives to call on architects and engineers in an effort to market their products. Paddock's larger operation permits it to pursue these efforts on a greater scale than Whitten (App. A, p. 41). The suppliers offer the architect proposed specifications to be included in the bid specifications. The architect may and often does adopt these model specifications verbatim in the official specifications upon which competitive bids are invited, since to do so saves him time and money (App. A, p. 41). Competitive bidding laws require that an "or equal" clause be included in the specifications in order to permit competing suppliers to bid against the specified system if it can meet the requirements of the specifications. (App. A, p. 41).

The job specifications are published in the Scan-Microfilm Service, a publication of McGraw Hill, to which companies in the construction industry, including also Whitten and Paddock, subscribe. Potential competing suppliers can obtain the job specifications from the Scan-Microfilm Service and can attempt to bid thereon. (App. A, p. 42).

D. *Paddock's Anticompetitive Marketing Scheme*

Paddock first acquired patent rights to its prefabricated pipeless recirculation system in 1958, and as we have seen, the pipeless system represented a major technological advance in the industry (App. A, pp. 36-37). Paddock remained the sole source of supply for pipeless recirculation systems until Whitten developed its pipeless system and first entered the market in 1966 (App. A, p. 36). Once Whitten had developed a product with competing advanced

technology in 1966, Paddock embarked upon its predatory scheme to put Whitten out of business.

In a market where Whitten and Paddock are the sole sources of supply for pipeless recirculation systems, the court of appeals noted that the Paddock companies were vertically affiliated for the common purpose of marketing the Paddock system. (App. B, p. 76). The sales activities employed by Paddock in marketing its system were characterized by the court of appeals as an "aggregation of dirty tricks" (App. B, p. 79), "a variety of unfair business practices" (App. B, p. 81), and "unethical" (App. B, p. 81), "immoral", (App. B, p. 85), "unfair and reprehensible" conduct (App. B, p. 85). Further, the court of appeals stated that Paddock had "subordinated business morality to its goal of more customers" (App. B, p. 85). Paddock's aggregation of dirty tricks was aimed at eliminating other parties, principally, Whitten, from competition (App. B, p. 79), and included the following activities:

1. The publication and promotion of "negative" specifications which not only describe Paddock's product in minute detail (App. A, p. 42), but also exclude Whitten by a direct reference. For example, Paddock's specifications require ". . . that no screws, slip joints, or mixtures of metal and plastics will be permitted". Screws, slip joints, and mixtures of metal and plastic are characteristics of the Whitten system but not the Paddock system (App. A, p. 43).

2. Whitten does not have the benefit of the large Paddock franchised dealer network and relies on the Scan-Microfilm Service to provide it with job specifications on a nationwide basis. (App. A, pp. 41-42). Paddock attempted to cut off the Whitten Scan-Microfilm Service (App. B, p. 78).

3. Paddock violated prebid procurement procedures on

federal projects "Fort Dix - Fort Devens" (App. A, p. 50) and "sneak-previewed" Whitten's bid on Fort Devens (App. B, p. 78).

4. Paddock engaged in several efforts to use gifts and pressure to improperly influence prospective buyers to Whitten's disadvantage (App. B, p. 72). For example, Paddock attempted to give a set of golf clubs to a public official who was the representative of the owner on the Massachusetts Department of Public Works pool program. (App. A, p. 49). Paddock also influenced the content of a report on swimming pool recirculation systems, published by the State University Construction Fund, a New York State agency (App. A, p. 46) (App. B, p. 72). The report showed Paddock in a most favorable light and focused on the weaknesses of the Whitten system (App. A, p. 46) and treated Whitten "unfairly" (App. A, p. 46) (App. B, p. 74). Paddock distributed in excess of 800 copies of the report pursuant to the permission granted to it by the State University Construction Fund in return for a "hold-harmless" agreement by Paddock (App. A, p. 47). The permission was subsequently withdrawn by the SUCF when it became aware of the unfair character of the report (App. A, p. 47). The SUCF report was to be used as a guide for architects in order to provide some continuity of design on various projects being planned by the State University Construction Fund. (App. A, p. 46). While neither of the lower courts made any specific finding as to the damage resulting to Whitten, the *only evidence* in the case was that Whitten was excluded from competing on all State University Construction Fund projects, including one project where the architect expressed a design preference for Whitten.

5. Specifications favorable to Paddock and hostile to Whitten excluded Whitten from bidding in the first two or three series of pools planned by the Massachusetts De-

partment of Public Works (App. B, p. 74). These specifications were the product of an architect who had helped to develop Paddock's design prior to its obtaining a license from the inventor. (App. A, pp. 47-48) (App. B, p. 74).

E. *Paddock's Purpose and Intent*

While the district court made no specific findings as to Paddock's intent, the court of appeals noted that one of Paddock's corporate officers, Herbert Ellis, told Whitten's president, "George, we will run you out of business if it takes all the money we have" (App. B, p. 79), and that Ellis urged Paddock's salesmen to "control, hold, gouge, coerce . . . get specified, stay specified, and obtain a contract" (App. B, p. 79). Moreover, the court of appeals stated that, "The district court seems to have assumed" that "there was a combination or conspiracy within the meaning of the Sherman Act, among the three Paddock companies and their franchised dealers." (App. B, p. 75). The court stated further that "the evidence is sufficient to portray a plurality of actors concerting their efforts toward a common end." (App. B, pp. 75-76). The purpose of this Sherman Act conspiracy and combination is revealed in the court of appeals opinion as follows:

> "The direct evidence of intent mustered by Whitten at most shows that Paddock intended to eliminate Whitten from the market . . . (T)he actions of Paddock assigned by Whitten as violation of section 2 are directed at Whitten, and only indirectly at suppliers of conventional recirculation systems, and thus suggest *an intent* no greater than that *proved explicitly* (App. B, p. 71) (emphasis supplied)

Reasons for Granting the Writ

I. The Case Presents Novel Questions of Major Significance in the Interpretation of the Sherman Act and Its Relationship to Competitive Bidding Statutes Which Have Not Previously Been Decided by this Court.

A. *The Volume of Commerce Subject to Public Competitive Bidding Statutes at Both the Federal and State Levels Is Substantial and Is Affected by the Decisions in this Case.*

The obvious public policy, both on a state and federal level, is to preserve competitive bidding on public contracts. This policy has been enacted into law by the passage of several competitive bidding statutes through this nation. The United States Congress has enacted statutes which require competitive bidding wherever public funds are involved (subject to limited exceptions which are inapplicable here). See 10, U.S.C. §§ 2301-2305 et seq.; 41, U.S.C. §§ 251-253. State legislatures have also enacted similar statutes requiring free and open competitive bidding where public funds are used in the procurement of goods and services. For example, see General Laws c. 30, § 39M (Massachusetts); General Municipal Law, § 103 (New York); C.G.S.A. § 4-112 (Connecticut); 71 P.S. § 638, 53 P.S. § 351 (Pennsylvania); N.J.S.A. 52:32-1 through 52:34-5 (New Jersey); K.S.A. 75-3739 (Kansas); M.C.L.A., § 108.5, § 123.501 et seq. (Michigan); M.S.A., § 16.07 (Minnesota). See generally 63 C.J.S. Municipal Corporation, §§ 1147-1149; 43 Am. Jur. Public Works and Contracts, §§ 23-40; 10 McQuillan, Municipal Corporations, § 29.29.

In *Whitten I*, the court of appeals recognized the importance of public agencies acting as consumers, and re-

ferred to an article, Note, *Application of the Sherman Act to Attempts to Influence Government Action,* 81 Harv. L. Rev. 847 (1968). (App. C, p. 99, n. 7). The article and its supporting references in turn establishes that as early as 1966 federal, state and local governments were estimated to have spent $150 billion on goods and services.[1] The volume of commerce subject to competitive bidding statutes is clearly of tremendous economic significance. Indeed, it is difficult to envision an area of greater national economic significance than that portion of our economy where competitors vie for their share of the market in which the government (federal, state, local) acts as a consumer. The overwhelming manifestation of public policy is to preserve free and unfettered competition as the rule of trade when the government acts as a consumer, thus the competitive bidding statutes. This policy certainly parallels the role of the Sherman Act which has been interpreted as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade". *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 4 (1958). However, the decisions below in this case sanction a wide-ranging conspiracy and combination designed to foreclose all competitors from the bidding stage. Paddock's scheme involves the use of specifications drafted by defendants in a manner calculated to qualify only one of the defendants as the sole firm entitled to bid on a project required by law to be awarded on the basis of competitive bid. Unless this Court reverses the decisions of the courts below, the Paddock scheme can be used by other manufacturers and suppliers in all segments of the economy. The result will be the wholesale emasculation of price competition on public purchasing despite the existence of the competitive bidding statutes.

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[1] Even if only 10 percent of the government purchases of goods and services were subject to competitive bidding, the volume of commerce would still be enormous — 15 billion dollars.

B. *The Sherman Act has a Major Role to Play in Preserving Price Competition in All Segments of the Economy Particularly those Regulated by Competitive Bidding Statutes.*

An examination of the competitive bidding statutes will establish that Congress and the several state Legislatures have decreed that there shall be competition at the *time of bidding*. The obvious purpose of these statutes is to provide the public with the benefit of competitive pricing opportunities in public purchasing. The court of appeals recognized, however, that when the Paddock specifications are adopted, "competition . . . attenuates after specification, despite the theoretical ability of conventional systems to qualify under the 'or equal' clause." (App. B, p. 67, n. 9). Nonetheless, the court concluded that the Paddock scheme did not violate either Section 1 or Section 2 of the Sherman Act, despite the obvious purpose of Paddock to eliminate Whitten's price competition at the bidding stage.

If the antitrust laws do not protect the relatively small manufacturer from those who conspire to defeat the purpose of the competitive bidding statutes, the small manufacturer is destined to a state by state remedy. This process, by its very nature, involves insurmountable expense and practical enforcement problems. If permitted, it will insure the success of those who conspire to render futile the protection afforded the public by competitive bidding statutes. Even if the small manufacturer had the economic resources to travel from state to state to state and engage in litigation or the administrative process in an attempt to protest its elimination from competition, many competitive bidding statutes simply do not provide a remedy.[2] It is only through

[2] Many of these statutes do not permit the unsuccessful bidder to contest the bidding procedures; thus there is no merit in arguing that Whitten, and thus the public, are protected by state to state

application of the Sherman Act to multi-state schemes to eliminate competitive bidding opportunities that effective relief can be obtained.[3]

During the relevant period of the present litigation, the combined sales of Whitten and Paddock exceeded 30 million dollars (App. A, p. 55). Of this amount, Paddock accounted for over 28 million dollars, while Whitten's sales were only 1.9 million dollars. (App. A, p. 56).

Little imagination is necessary to envision the volume of commerce which could be restrained by multiples of companies with sales of 30 million dollars should they adopt the Paddock practices approved by the courts below. By ignoring the controlling precedents of this Court, the lower courts have decreed that private profit motives which "subordinate business morality to [the] goal of more customers" will permit private companies to remove the bidding stage from the area of effective competition and to defend on the ground that competition exists at some point in time which antedates the issuance of the specifications. Surely, the decisions below frustrate the clear intentions of Congress and the states to have price competition in the form of competitive bids submitted on the basis of specifications already issued. The courts below have clearly permitted private parties to change national policy in the name of private greed.

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enforcement. Moreover, such an ad hoc effort at enforcing "competitive bidding" would create insurmountable practical and financial problems which would insure the success of those who seek to circumvent the competitive bidding statutes.

[3] The Court of Appeals suggests that the Federal Trade Act is available as a remedy, (App. B-24) but it is fundamental that this Act does not provide for a private remedy.

C. *The Decisions Below Permit and Encourage Combinations and Conspiracies to Eliminate All Competitors from the Bidding Stage in Frustration of the Clear Legislative Requirement that Public Contracts be Awarded Pursuant to Competitive Pricing Opportunities.*

In order to appreciate fully the road map which the lower court opinions have provided manufacturers and suppliers who seek to avoid competitive bidding requirements, it is necessary to examine briefly some of the exclusionary provisions of the Paddock specifications. The court of appeals chose not to print the actual language of the specifications, but instead referenced a hypothetical situation in its opinion (App. B, p. 77, n. 18). It is impossible to hypothesize more exclusionary specifications than those *actually* employed by Paddock. A few examples will suffice:

The Whitten system uses screws and slip joints. The Paddock system does not, and yet the Paddock model specification reads as follows:

> It is the intent of these specifications that the entire perimeter recirculating system be welded into a single continuous section and that *no screws, slip joints or cemented connections, etc., will be permitted.* (Emphasis supplied.)

The Whitten system employs inlets which are adjustable above 45° angle. The Paddock system does not, and yet the Paddock model specifications reads as follows:

> *Inlets whose discharge may be adjusted above a 45° angle* short circuiting filtered water to the surface *shall not be acceptable.* The perimeter distribution system shall be designed to provide a uniform and equal pressure at each inlet. (Emphasis supplied.)

The Whitten system uses a grate over its gutter. The Paddock system does not, and yet the Paddock specification reads as follows:

> All areas of the gutter shall be accessible for inspection *without removal of plates, covers, etc.* (Emphasis supplied.)

Paddock's specifications are not merely proprietary; they go much further than merely describing features of the Paddock product, and, as we have seen, are intentionally drafted to expressly prohibit the use of features of the Whitten product, which features Paddock does not have. The court of appeals in *Whitten I*, recognized the significance of this device and the resulting illusory nature of the "or equal" clause:

> These specifications are on their face neutral technical descriptions of generally available pool accessories, but a closer inspection reveals that they describe Paddock's products—(and only those) in a variety of ways. . . . Much of the equipment is described in a way that would rule out features of Whitten's equipment. While the specifications provide for "an approved equal" for the described equipment, the specific functional or structural requirements would rule out the practicable possibility of an equal being accepted. (App. C, p. 91).

The court's concern in *Whitten I* for the elimination of competition by the use of the Paddock exclusionary specification and the illusory nature of the "or equal" clause is shown by the evidence in *Whitten II*, from Paddock's own officers and records, to be both real and justified.[4]

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[4] The intentional design of the Paddock specifications to eliminate Whitten was established by the testimony of Mr. DeRose, the draftsman of the Paddock specifications and a principal Paddock officer who testified as follows:

The court of appeals in *Whitten II* even recognized the significance of getting specified:

> The argument for a market definition encompassing both pipeless and conventional systems would have been more difficult to accept had we concluded that there is no effective competition between the two systems before product specification, since the evidence suggests that that *competition between the two systems attenuates after specification, despite the theoretical ability of conventional systems to qualify under the "or equal" clause.* (Emphasis supplied.) (App. B, p. 67, n. 9).

The purposeful promotion of exclusionary specifications negating the use of a competitor's product in competitive bidding will be encouraged by the district court's opinion and that of the court of appeals. The resulting effect upon the significant area of commerce involved in competitive bidding will be disastrous.

II. The Decisions of the Courts Below on Significant Questions of Federal Law are in Conflict With Several Decisions of this Court.

The opinions of the district court and the court of appeals in this case fail properly to follow controlling decisions of this Court and embody a fundamental misconception of the Sherman Act. Their misapplication and misinterpretation of the law must be rectified by this Court for uniform interpretation of the Sherman Act and for justice to this Petitioner.

Q. Until Whitten had the grate, your specifications did not refer to a grate, that is correct, isn't that true?

A. That is correct.

Q. When Whitten had the grate, you then referred to systems employing grates shall not be considered equal to yours, isn't that right?

A. Yes, sir.

A. *The Sherman Act Forbids "Contracts," "Combinations," and "Conspiracies" to Restrain Trade and to Monopolize. The Requirement of the Courts Below That Petitioner Prove the Existence of a Restraint of Trade or an Attempt to Monopolize Is In Direct Conflict With* United States *v.* Socony-Vacuum Oil Co. *and Other Decisions of This Court Which Hold That Proof of Restraint of Trade or Attempt to Monopolize Is Not Essential to a Claim Under the Sherman Act.*

The complaint herein alleged that the three Paddock companies have agreed, conspired and combined among themselves and with the independent franchised Paddock dealers and others to restrain trade and commerce in violation of Section 1 of the Sherman Act and to monopolize in violation of Section 2 of the Sherman Act. Yet, neither court made any finding or even commented upon petitioner's claim of a combination and conspiracy to monopolize. The failure of both courts to make findings on petitioners section 2 combination-conspiracy claims in itself requires reversal. *Kelley* v. *Everglades Draining District,* 319 U.S. 412 (1943) and *Irish* v. *United States,* 225 F. 2d 3 (9th Cir. 1955). Moreover, the district court made no findings at all with respect to any of the conspiracy and combination counts. Instead, it imposed an improper burden upon your petitioner, requiring proof that defendants had "imposed" an actual restraint on trade or commerce:

> In order to sustain its burden with respect to Counts I through III of the Complaint, the plaintiff must demonstrate that the defendant has imposed a "... restraint of trade or commerce among the several states ..." 15 U.S.C. § 7 [App. A, pp. 51-52]

The court of appeals noted the failure of the district court to make findings on the conspiracy-combination counts [5] but, as more fully developed in Section B below, similarly required that petitioner prove the existence of an actual restraint of trade or an attempt to monopolize. This is in direct conflict with *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-225 n. 59 (1940), where, after noting that the situs of the effects of the conspiracy was relevant for forum jurisdiction only, the Court continued:

> But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act. That would be true if power or ability to commit an offense was necessary in order to convict a person of conspiring to commit it. But it is well established that a person "may be guilty of conspiring, although incapable of committing the objective offense." *United States* v. *Rabinowich*, 238 U.S. 78, 86, 35 S.Ct. 682, 684, 59 L.Ed. 1211. And it is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. *Nash*

[5] Indeed, the Court of Appeals expressly states that the conspiracy-combination counts raised "an issue which was not specifically addressed by the district court." [App. B, p. 75] Attempting to treat this failure as trivial the Court of Appeals states:

> The district court seems to have assumed the point as proven, for it devoted its analysis to the question whether the actions engaged in did or did not amount to a restraint of trade.

Clearly, the Court of Appeals' belief as to what the district court "seems" to have "assumed" is not a proper substitute for a finding. It is obvious that the district court misconstrued the statute and did not realize that defendants could combine and conspire to restrain trade even though they might not be successful in "imposing" an actual restraint on trade. Moreover, nowhere is it recognized in either opinion that Section 2 of the Sherman Act declares that "[e]very person who shall . . . combine or conspire with any other person to monopolize any part of the trade or commerce among the several States . . . shall be guilty of a misdemeanor." 15 U.S.C., §2.

> v. *United States*, 229 U.S. 373, 378, 33 S.Ct. 780, 57 L.Ed. 1232. It is the "contract, combination * * * or conspiracy, in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. (Citations omitted.)

Section 2 of the Sherman Act similarly forbids combinations and conspiracies to monopolize even though monopolization might not result. *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 573 (2nd Cir. 1961), *United States* v. *National City Lines, Inc.*, 186 F. 2d 562, 566-68, 575 (7th Cir. 1951), cert denied, 341 U.S. 916 (1951), *Bowen* v. *New York News, Inc.*, 366 F. Supp. 651 (S.D. N.Y. 1973). Plaintiff asserts it has sustained its burden of proving combination or conspiracy under section 1 by showing collaborative conduct involving per se violations of the Sherman Act and under section 2 by proving collaborative efforts to monopolize the supply of pipeless recirculation systems. The fact that defendants' scheme may not have been wholly successful is immaterial.

The lower courts herein have ignored the statutory language and instead have amended the statute judicially by effectively deleting the combination and conspiracy language from the Sherman Act. What the courts below have in effect done is to hold that in order to prove a conspiracy to murder, there must be proof of murder. The issue in this case is not whether the defendants restrained or monopolized trade but whether they combined and conspired to do so. As this Court has stated it is the contract, combination or conspiracy which the Act strikes down "whether the concerted activity be wholly nascent or abortive on the one hand, or succesful on the other." *United States* v. *Socony-Vacuum Oil Co., supra.*

B. *The Lower Court Decisions Are in Direct Conflict With* Klor's, Inc *v.* Broadway-Hale Stores, Inc. *and Other Decisions of This Court Which Hold That Proof of Market Power and Substantial Adverse Effect on Competition Are Not Essential Elements of Conspiracy and Combination Under the Sherman Act.*

In concluding that petitioner had not established a *per se* violation of Section 1 of the Sherman Act, the court of appeals ruled that:

> analysis of market power as opposed to effect is required for most per se violations although not for price fixing; in this latter unique realm anti-competitive purpose, without more, has been said to be sufficient to invoke the sanctions asserted with Section 1 violations. (Footnotes omitted.) (App. B, p. 80)

Subsequently, the court stated:

> The dispositive element seems to us to be the effect of Paddock's actions on competition in the affected market.[6] (App. B, p. 85)

In contrast, this Court has never stated that the per se rule for price fixing is different from that applicable to other *per se* offenses except for tying arrangements.[7] The

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[6] While this last passage appears in the portion of the opinion applying the rule of reason, the court indicated in a footnote that it is equally relevant to *per se* offenses except for price fixing. (App. B, p. 85, n. 31)

[7] In the case of tying arrangements, it must be shown that the defendant possessed "sufficient economic power" to effectuate the tie. However, even this requirement does not necessitate proof of "market power" which the court below requires for proof of all *per se* violations other than price fixing. For as this Court stated in *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962):

rationale and operation of the *per se* rule is set forth in *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958):

> *However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused* or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investi-

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The standard of illegality is that the seller must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product * * *." Northern Pacific R. Co. v. United States, 356 U.S. 1, 6, 78 S.Ct. 514, 518, 2 L.Ed. 2d 545. Market dominance —some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

In a footnote, the Court makes it even clearer that the requisite "economic power" is substantially less than "market power:"

> Since the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a demonstration of market power in the sense of §2 of the Sherman Act, it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market. This is even more obviously true when the tying product is patented or copyrighted, in which case, as appears in greater detail below, sufficiency of economic power is presumed. Appellants' reliance on United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264, is therefore misplaced.

371 U.S. at ___, n. 4.

> gation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements. (Citations omitted and emphasis supplied.)

Similarly, in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959), this Court stated that:

> The Court (in the *Standard Oil* rule of reason opinion)[8] recognized that there were some agreements whose validity depended upon the surrounding circumstances. It emphasized, however, that there were classes of restraint which from their very "nature or character" were unduly restrictive, and hence forbidden by both the common law and the statute, 221 U.S. at pages 58, 65, 31 St. Ct. at page 515. As to these classes of restraint, the Court noted, *Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred.* Id. at pages 63-68, 31 St. Ct. at pages 517-518-519. (Emphasis supplied.)

It has consistently been the law that the illegality of many combinations and conspiracies stems from their very purpose or their inherent nature or character. As far back as 1911, this Court in *United States* v. *American Tobacco Co.*, 221 U.S. 106, 179 (1911), stated that the Sherman Act:

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[8] *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911).

> embrace[s] . . . acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade . . .

Particularly pertinent to the issues at hand is the *Klor's* case. The approach of the lower courts in *Klor's,* which is the same as that of the lower courts in this case, was forcefully rejected by this Court's decision that public harm or injury to competition is not necessary.

The parallels between the lower courts' reasoning which was repudiated in *Klor's,* and that of the lower courts in this case, are obvious.[9] As indicated in Part A above, the district court herein ruled that Section 1 of the Sherman Act would be violated only if the defendants had actually "imposed a restraint of trade or commerce." The court of appeals herein similarly required proof of public injury.[10]

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[9] In *Klor's*, the district court had dismissed a group boycott complaint and granted summary judgment for defendants on the ground that the complaint alleged only a "purely private quarrel" "which did not amount to a 'public wrong proscribed by the [Sherman] Act'". *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, supra at 210. In affirming, the Ninth Circuit stated that "a violation of the Sherman Act requires conduct of the defendants by which the public is or conceivably may be ultimately injured" and held that public injury had not been established since "there was no charge or proof that by any act of defendants the price, quantity or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality." *Id.*

[10] Indeed, the court of appeals framed the issue as follows:

> The question posed, after reviewing and accepting the specific findings of the district court, is whether this aggregation of dirty tricks, played by those with little market power, which were not demonstrably successful, if aimed at eliminating other parties from competition (or, as some of the evidence indicates, principally Whitten), constituted a violation of 15 U.S.C. §1. This raises, as appellant recognizes, the question whether such

There can be no clearer repudiation of this approach than that contained in the *Klor's* opinion. Without drawing any distinctions between the various classes of *per se* offenses, this Court held group boycotts are per se illegal stating:

> They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily to stimulate competition they were banned. (Citations and footnotes omitted.) 359 U.S. at 212.

In holding that the combination of business firms formed for the purpose of denying another firm of its freedom to sell or buy in an open competitive market and to drive it out of business is per se illegal without proof of injury to competition, the *Klor's* Court explained:

> The combination interferes with the natural flow of interstate commerce. It clearly has, by its "nature" and "character" a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. (Footnote omitted.) 359 U.S. at 213.

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a combination of conduct and motive amounts to conduct which is illegal *per se*.

The court answers its questions negatively because the defendants did not possess "market power" [App. B, p. 79], there was no "significant" effect on the relevant market [App. B, p. 80], "no evidence whatever of harm to general competition in the market" [App. B, p. 85], "[t]he number of competitors has not been affected, nor has the market been fixed or manipulated, so that competition is lessened" [App. B, p. 85], petitioner "ha[d] not established actions amounting to attempted price fixing" [App. B, p. 80], and "[t]he actions carried on by Paddock do not involve the complex systematic influences on production, price formation, and market allocation . . ." [App. B, p. 81].

The court of appeals' requirement of proof of "market power" or a substantial lessening of competition is analytically faulty and will severely handicap enforcement of the Sherman Act. These substantive requirements, which the court of appeals would engraff on the per se rule, would convert all behavorial antitrust problems into structural antitrust cases. All section 1 cases would require the complex investigation of economic factors which this Court noted in *Northern Pacific, supra,* involve "an inquiry so often wholly fruitless when undertaken." In addition, the court's requirement would emasculate Section 1 of the Sherman Act, strip it of all independent significance and convert it into a redundant adjunct of Section 2 of the Sherman Act and Section 7 of the Clayton Act.

The only authority cited by the court of appeals for its statement that "analysis of market power . . . is required for most per se violations" does not support this proposition. Indeed, the cited authority, Cooper, *Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section 2,* 72 Mich. L. Rev. 375, 423, n. 182 (1974), states the opposite proposition on the very page cited by the court. In discussing conspiracy to monopolize cases under Section 2 of the Sherman Act, the author states:

> Although few cases focus on the issue, it seems to be accepted that *proof of* relevant market or *market power is not required in a conspiracy to monopolize case.* The contrast with the majority view requiring such proof in attempt cases is underscored by a recent decision that expressly ruled that failure to prove a dangerous probability of monopoly precluded finding an unlawful attempt to monopolize but did not interfere with finding an unlawful conspiracy to monopolize.
>
> The superficially expansionary character of the conspiracy decisions is deceiving. As in the case of

> attempts, *it may be earnestly argued that the lack of benefit from conspiratorial conduct justifies its prohibition regardless of the distance separating the conspirators from monopoly power. The argument makes sense;* it makes so much sense that it has been adopted in a wide array of decisions finding violations of section 1. (Footnotes omitted and emphasis supplied.)[11]

Under the decision of the court of appeals, unless they seek to fix prices, no combination of business firms which does not possess "market power" can violate Section 1 of the Sherman Act "however offensive" [App. B, p. 85] "unfair and reprehensible" [App. B, p. 85] their conduct. The Sherman Act would then regulate only the activity of the giant corporations.

C. *The Lower Court Decisions Are in Direct Conflict With* Fashion Originators Guild of America *v.* Federal Trade Commission, Klor's, Inc. *v.* Broadway-Hale Stores, Inc., United States *v.* General Motors Corp. *and Other Decisions of this Court Which Hold that Combinations and Conspiracies to Drive a Class of Competitors, or Even a Single Competitor, out of Business Are Illegal Per Se Under the Sherman Act.*

The court of appeals recognized that the defendants had combined and conspired to drive out of business the only competing supplier of a pipeless recirculation system by the use of a "variety of unfair business practices" [App. B, p. 80], which included "an aggregation of dirty tricks"

[11] It is clear from the text of the article's footnotes on which the court relies that the author is simply stating that "some inquiry into market power" is required for rule of reason cases under Section 1 of the Sherman Act and in the tying cases where some "economic power" though not "market power" must be shown. See note 7, supra.

[App. B, p. 79], "distasteful efforts" "to influence by improper means" governmental officials and reports [App. B, p. 78], negative specifications, and other anticompetitive conduct characterized by the court as "unethical" [App. B, p. 81], "immoral" [App. B, p. 85], "reprehensible" [App. B, p. 85] and, specifically, as "unfair competitive practices accompanied by an intent to hurt a competitor" [App. B, p. 84]. Yet, despite this impressive array of anticompetitive conduct and controlling precedent of this Court, the court of appeals refused to find any violation of the Sherman Act stating:

> . . . we see no license to proclaim unethical efforts to influence buyers, advisors to buyers, or suppliers of competitors, to be illegal per se under the antitrust laws. Such actions have long existed, but have not as yet joined the per se pantheon recognized by the Supreme Court. [App. B, p. 81]

Contrary to the court of appeals' statement such conduct has long been held illegal per se under the Sherman Act.

In *Fashion Originators Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 465 (1941), this Court held that the combination of business firms formed to drive competitors out of business by pressuring buyers into refusing to purchase the products of competing firms was per se illegal under the Sherman Act. This Supreme Court stated:

> Under the Sherman Act "competition, not combination, should be the rule of trade." And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it . . . has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the

> sale of unregistered textiles and copied designs. (Citations omitted.)

Similarly, in *United States* v. *General Motors Corp.*, 384 U.S. 127, 140 (1966), this Court held that the combination of a single manufacturer and its independent franchised dealers to prohibit other dealers from selling Chevrolet automobiles through discounters was "a classic conspiracy in restraint of trade," since it was designed "to eliminate a class of competitors" "by joint collaborative action." This Court stated:

> There can be no doubt that the effect of the combination or conspiracy here was to restrain trade and commerce within the meaning of the Sherman Act. *Elimination by joint collaborative action, of discounters [i.e. competitors] from access to the market is a per se violation of the Act.* (Emphasis supplied.) 384 U.S. at 145

and that:

> *Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved* by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed — as in *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Comm'n., supra,* 312 U.S., at 468, 61 S. Ct., at 708. (Emphasis supplied.) Id. at 146-47.

The principle that combinations of business firms formed for the purpose of eliminating a competitor are illegal per se is so fundamentally consistent with the policy of the Sherman Act and the underlying rationale of the per se rule that it has even been applied by this Court in the difficult areas involving labor's exemption from the antitrust laws and claims of freedom of speech and association. Thus in *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 665-66 (1965), this Court stated:

> One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. (Emphasis supplied.)

Similarly, in *Eastern RR Presidents Conference* v. *Noerr Motor Freight, Inc.*, 456 U.S. 127 (1961), the court held that the association of individuals to influence legislative or executive action was immune from the antitrust laws but stated:

> There may be situations in which a publicity campaign, obstensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. 365 U.S. at 144.[12]

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[12] This theory was directly relied upon by the Supreme Court in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 511 (1972), in holding a complaint valid under the Sherman Act which charged defendants had combined in a scheme to drive their competitors out of business.

If, in these far more difficult areas of Sherman Act enforcement, it has been held repeatedly that when business firms combine with a union to drive competing business firms out of the market, the Sherman Act is violated, then it must follow as an *a fortiorari* principle that the Sherman Act is necessarily violated by the combination of two or more business firms formed for the purpose of driving another company out of business.

The issue in this case is simple and the law is clear. Paddock's scheme involves the collaborative use of a wide variety of dirty tricks by a company already firmly entrenched in a market to fight off and destroy a new entrant. In 1958, Paddock first acquired rights to a patented product representing a major technological advance in the industry. It became the sole source of supply of prefabricated metal pipeless swimming pool gutters and viewed the pipeless gutter market as its own exclusive personal preserve. When in 1966, Whitten developed a product with competing technology, Paddock immediately embarked upon its predatory scheme to drive Whitten out of business.[13] Obviously, the Paddock combination and conspiracy involving the multiple "dirty tricks" and "unfair business practices" enumerated in the opinion of the court below constitutes a per se violation of the Sherman Act, since they "serve hardly any purpose beyond the suppression of competition," *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 305 (1949); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 6 (1958), and since "[t]hey deny competitors free access to the market," (*Northern Pacific Ry. Co.* v. *United States, supra*, at 6), and since "it is unreasonable, per se, to foreclose competitors from any substantial market." *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947).

[13] There is no question here of Paddock's intent. See Statement of the Case, Section E, *supra*.

As Mr. Justice Marshal, speaking for this Court in *United States* v. *Topco Associates*, 405 U.S. 596, 610 (1972), has stated:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. *And the freedom guaranteed each and every business, no matter how small, is the freedom to compete* — to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster. (Emphasis supplied.)

Clearly, the Paddock conspiracy and combination condoned by the courts below seeks to deny petitioner of this fundamental economic freedom. Your petitioner seeks the reversal of the decisions below so that it may be able "to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster" to compete with Paddock in the manufacture and sale of pipeless recirculation systems to public purchasers.

D. *The Lower Court Decisions Are in Direct Conflict With the Decision of this Court in Continental Ore Co.* v. *Union Carbide & Carbon Co.*

The court of appeals recognized that the district court made no findings as to the allegations of conspiracy.[14] There are other examples of incomplete findings. For example, the district court found that Paddock distributed an unfair report involving the State University Construction Fund in the State of New York, but the district court

[14] See note 5, *supra*.

made no findings as to the effect in the market place of this report. The *only* evidence in the case was that Whitten lost every job controlled by the State University Construction Fund including a job in which the architect approved and expressed a preference for the use of the Whitten system. In spite of the "unethical," "immoral" and "reprehensible" conduct of the defendants, each of their "dirty tricks" were viewed separately by the courts below, and no findings were made as to their general purpose and intent. Both the court of appeals and district court fragmentized the plaintiff's proof in violation of the principle of *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 698-699 (1962), where this Court stated:

> It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, *plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole;* and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it." (Citations omitted and emphasis supplied.)

Conclusion

The defendants have combined and conspired to eliminate Whitten from the market and have "subordinated business morality to its goal of more customers." The de-

fendants have engaged in marketing practices which include an "aggregation of dirty tricks," "unfair business practices," "unfair and reprehensible" conduct, and the promotion of specifications which when adopted subvert the national policy of competitive bidding. The defendants' conduct cannot rise to the dignity of establishing precedent for this and similar conduct being immune from the antitrust laws. The Petition should be granted in order that the public can again be told that a predator in business cannot take advantage of the less fortunate through the practices herein enumerated.

Respectfully submitted,

JOHN D. O'REILLY, JR.
St. Thomas More Drive
Brighton, Massachusetts 02135
Attorney for Petitioner

Of Counsel:
JOHN E. LECOMTE
FRANK T. BARBER, III
PETER A. DONOVAN
LECOMTE, SHEA & DANGORA
27 School Street
Boston, Massachusetts 02108

APPENDIX A

GEORGE R. WHITTEN, JR., INC.,
d/b/a WHITTEN CORPORATION
v.
PADDOCK POOL BUILDERS, INC., et al.

Civ. A. No. 68-695-F.
United States District Court,
D. Massachusetts.

April 12, 1974.

John E. Lecomte, Howard A. Levine, Boston, Mass., for plaintiffs.

Paul A. Good, Butterworth & Good, Lynn, Mass., John D. Hawke, Jr., Washington, D. C., for defendant.

OPINION

FREEDMAN, District Judge.

This civil antitrust action was commenced in August of 1968. The Court of Appeals reversed a summary judgment for the defendant in 1970 and remanded the case for trial. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir., 1970). Thereafter the case was tried before this Court, sitting without a jury, over a period of twenty-two (22) days from July 9 through August 10, 1973. After a careful review of the entire record—including the trial transcript, nearly 600 exhibits, and the briefs and memoranda of counsel—the Court has made the following findings of fact and conclusions of law.

The parties

The plaintiff, George R. Whitten, Jr., Inc., (Whitten), is engaged in the design, manufacture, and installation of a stainless steel swimming pool recirculation system and accessory equipment and also in serving as a general con-

tractor for the construction of entire swimming pool facilities. Whitten, incorporated in 1964, is controlled by George R. Whitten, Jr., its president and principal stockholder, and has its usual place of business in Bellingham, Massachusetts. Its recirculation system, known by the trademark "Uniflow," was first marketed in 1966 and patented in 1968. It should be noted that during the period covered by this action—1965 to 1971, Whitten's total sales increased from $116,653 to $650,487.

The defendants, Paddock Pool Builders, Inc., Paddock of California, Inc., and Paddock Pool Equipment Co., Inc. (hereinafter collectively Paddock), are closely affiliated separate corporations and under the control of William Baker, their principal stockholder. They are all located in Albany, New York. Paddock of California, Inc. holds the Paddock trademarks and is the licensee of a patent under which a metal swimming pool recirculation system is manufactured. Approximately thirty (30) swimming pool dealers and distributors throughout the country are franchised by this Paddock company to use the trademark and sell the Paddock products. Paddock Pool Equipment Co., Inc. manufactures and distributes swimming pool equipment and accessories, including its patented metal recirculation system, the Integrated Flow Recirculation System (I.F.R.S.). These products are sold to Paddock dealers and to independent contractors for use in residential and public pools. Paddock Pool Builders, Inc. is a swimming pool contractor and construction company which builds residential and public pools in the northeastern region of the United States. The pool equipment used in its construction is purchased from Paddock Pool Equipment Co., Inc.

The Product

The allegations in the complaint are directed at the marketing and distribution practices employed by Paddock in

promoting its I.F.R.S. system. Whitten's Uniflow system is in competition with the I.F.R.S. system for public swimming pool business. While the two systems perform essentially the same function in much the same manner, there are clear differences between them.

Recirculation systems are designed to remove water from a swimming pool, pass it through a filter and chlorinator, and then reintroduce the filtered and chlorinated water into the pool. The basic purpose is to maintain the cleanliness and clarity of the water while losing as little as possible to waste. It is considered important to skim water from the top of the pool where most of the contaminants are concentrated, as well as to allow some water to be recirculated through the drain. In fact, this skimming from the top is now required by most state health codes for public swimming pools.

There are several methods of providing this type of recirculation. The majority of the recirculation systems now in use fit within the category of what are called conventional systems. These are systems which are fashioned from traditional swimming pool materials: tile, concrete, masonry. The conventional system requires that pipes be installed around the perimeter of the pool in order to return the clean water. In the last fifteen years the metal prefabricated pipeless recirculation gutters have entered the market and made significant inroads. These systems have the advantages of prefabrication and the fact that no pipes need to be laid around the pool. Such systems have been fabricated from galvanized steel, stainless steel, and aluminum. This development has not eliminated the conventional gutter which still enjoys a dominant role in the industry.

Whitten's patented Uniflow system first appeared on the market in 1966. The system is designed such that the surface of the water is maintained slightly above the top of the gutter. The surface water thus overflows into the gutter and

is conducted through the gutter to the filter. The newly filtered and chlorinated water is returned to the pool through a plastic pipe in the gutter which has outlets for injecting the water into the pool. The gutter channel is covered by a plastic grate with holes appropriately spaced to control the flow of water into the gutter. The grate protects the plastic pipe. The grate is not easily removed, but maintenance personnel are equipped with a special tool which facilitates such removal. The prefabricated gutter sections are joined together end to end by spot welding.

Paddock's I.F.R.S. had its beginnings in 1958 with the so-called Ogden patent. The patent was assigned to Lifetime Metal Products, Inc., an Ohio corporation. In 1963 the patent was again assigned, this time to Paddock. It has undergone some changes and modifications, but basically it embodies the original Ogden design.

The I.F.R.S. consists of an open metal gutter channel which receives water from the surface of the pool and conveys it to the filter. The filtered and chlorinated water is returned to the pool via the rectangular shaped conduit which forms the lip of the gutter. The gutter channel and return conduit are of different gauge steel and there is a continuous weld along the length of the gutter joining the two sections. During periods of quiescence the water level is below the lip of the gutter. There are openings in the gutter which permit the water to be skimmed from the surface during such periods of non-use. When the pool is in use these openings, or skimming weirs, are closed and skimming is over the gutter lip. This different methods of skimming is required since the water level rises when the pool is in use as a result of the displacement of the bodies of the bathers. This rising of the water level is referred to as "surge."

Although both Unifiow and I.F.R.S. represent a departure from conventional recirculation systems, there are substan-

tial differences between the two systems. The following is a list of the significant differences; it is by no means exhaustive.

1. Uniflow returns the water to the pool by means of a removable plastic pipe mounted in the gutter. I.F.R.S. uses a steel conduit which forms the gutter lip.

2. Uniflow uses Type 304 stainless steel; I.F.R.S.-Type 304L. The difference is that the Paddock stock is low carbon which is desirable where there is considerable welding as there is in the I.F.R.S. design. It is not necessary where there is just spot welding as in the Uniflow system.

3. Uniflow's skimming function is accomplished by permitting the water to overflow the lip all around the perimeter of the pool. I.F.R.S. uses openings below the gutter lip (skimming weirs) placed at intervals around the pool. Paddock claims that this enables its system to accommodate the surge produced when the pool is in use without the use of a special tank called a surge tank. Whitten claims that its system performs a better job of skimming and that I.F.R.S. requires a surge tank (as does Uniflow) regardless of its claims.

4. The gutter of the Uniflow system is covered by a plastic grate; the I.F.R.S. system utilizes an open gutter. The difference is a function of the return pipe configuration: a plastic pipe which must be protected in the Whitten system; a welded part of the gutter lip in the Paddock version. Whitten claims its system is safer as a result since bathers' limbs cannot get caught in its gutter Paddock asserts that its open gutter is preferable since it is more accessible and easier to keep clean.

These differences provide a basis upon which a prospective buyer, or architect representing a buyer, may make an informed choice of one system over the other.

Relevant Market

[1] In cases brought under the antitrust statutes it is important to define the competitive area in which the parties operate. The plaintiff argues that this market should be restricted to prefabricated pipeless pool gutters. The Court rejects this argument; it is clear that the market within which the plaintiff and defendant compete encompasses the entire public swimming pool industry.

Whenever a public swimming pool is contemplated the potential choice of gutter is not limited to Uniflow and I.F.R.S. All of the conventional tile, concrete, or masonry possibilities are available, as well as the aluminum pool offered by Chester Products. The record is replete with references to pool projects for which Whitten and Paddock had competed that were ultimately built of conventional materials. Often specifications are issued for pool bids which contain the option of bidding either a metal prefabricated system or a conventional system.

The leading case setting forth the considerations for determining the market for purposes of the antitrust laws is United States v. E. I. Du Pont De Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed 1264 (1956). That case was brought under the monopoly section of the Sherman Act, 15 U.S.C. § 2, alleging that Du Pont had a monopoly in the cellophane market. The Court decided that there was no monopoly since the relevant market was the flexible packaging material market which included Saran, foil, glassine, etc. The Court found that these products were subject to a cross-elasticity of demand. That is, if the price of one of these materials became too high, consumers would simply change to a competitor product.

> The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. The market is composed of products that

> have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. *Id.* at 404, 76 S.Ct. at 1012.

The plaintiff recognizes that it is competing for business with conventional gutter recirculation systems when in its catalog it states that the Uniflow system is "Equal in cost to conventional gutter construction." It is clear tha plaintiff and defendant specialize in pipeless prefabricated gutters, but it is equally clear that both are competing against the conventional gutter and other specialty manufacturers for a share of the public swimming pool market.

I find that metal prefabricated pipeless gutters do not constitute a definable submarket within the recirculation systems market. Brown Shoe Co. Inc. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

The public pool industry includes those pools which are built for governmental units, educational institutions, neighborhood groups, and clubs. The Court finds that there were 27,150 such pools built during the years 1966-1971. Of this number Paddock built 733.

Bidding Practice in the Industry

To understand the process within which these allegations arise, the Court will outline the procedure for awarding contracts for public pools. It is assumed that these procedures are governed by a typical state competitive bidding statute. The public body which is interested in constructing a pool first retains an architect to prepare plans and specifications for bidding. The architect may refer to Sweet's Catalog, a McGraw-Hill publication which contains brochures and specifications of manufacturers who specialize in the various areas of the construction industry. Both the plaintiff and defendant are listed in *Sweet's*. The manufacturers may receive an inquiry from the architect or they may become aware of the project through *Dodge Reports*,

another McGraw-Hill service which circulates information through the industry concerning projects which are in the design and planning stage. Paddock and Whitten subscribe to this service.

Once the manufacturer or supplier becomes aware of a pending project he contacts the architect in an effort to sell his particular system. Whitten and Paddock employ salesmen and manufacturers' representatives to call on architects and engineers in an effort to convince them of the merits of their respective systems. Paddock's larger operation permits it to pursue these efforts on a greater scale than Whitten. At this stage the competition includes all types of gutter and recirculation systems—prefabricated and conventional. The suppliers offer the architect proposed specifications to be included in the bid specifications if the architect is convinced of the merits of the product. Such specifications are generally proprietary; i.e. they describe the precise characteristics of the proponent's product—often including the brand name. The architect may include these specifications verbatim in his final product since it saves him time and money to simply incorporate them as is. Once a product is specified in the plans it becomes much easier to win a contract at the time of bidding. There is vigorous competition among the suppliers and manufacturers at this point to "get specified." Often more than one system is specified. For example, Uniflow might be specified as the base bid with a conventional system as an alternate. The state public bidding laws require that a clause be included in the specifications that permits a supplier or manufacturer to bid against the specified system if it can demonstrate to the satisfaction of the owner or architect that it is the equal of the one specified.

When the specifications are put out for bids other suppliers not involved in the pre-specification stage are free to approach the architect in an effort to be certified to bid as an

equal or to be specified as an alternate. A supplier who was not previously aware of a project would see the specifications reported in the Scan Microfilm Service, another McGraw-Hill publication to which both Paddock and Whitten subscribe.

[2-4] With this as a background the Court will examine the specific allegations in the complaint. Counts I-III charge that Paddock and its dealers and representatives violated § 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to require the use of its specifications with the intent of excluding competitors. These counts further allege that this was done through misrepresentations, threats of litigation and harassment. Counts IV-VI allege that the same acts set forth in Counts I-III constituted an attempt to monopolize in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. Counts VII-VIII charge that the defendants violated § 3 of the Clayton Act, 15 U.S.C. § 14, by requiring its customers to use Paddock accessories whenever they use Paddock's gutter system.

Paddock's Practices

A. *Restrictive Specifications*

The first of the practices which Whitten alleges is proscribed by the antitrust laws is the use of proprietary specifications. It is clear that the defendant does write such specifications and that they describe in detail the I.F.R.S. system. I find that the usual course in this business is to attempt to "get specified." The defendant and the plaintiff were in agreement that this was a crucial stage in obtaining a contract. Before the specifications are issued is when the competition is keenest. The purpose of this pre-specifications activity is to sell the system. A successful sales job at this point results in proprietary specifications being adopted by the architect.

I find that both Paddock and Whitten engage in this

practice. When one is successful and is specified the proprietary specifications make it difficult for the competition to qualify to bid. For example, Paddock specifies Type 304L stainless steel; Whitten specifications require Type 304. Paddock calls for an open gutter; Whitten specifies that the gutter shall be covered. These differences in the proprietary specifications point up the fact that the systems are different.

After a set of specifications has been accepted by an architect a disappointed contractor or supplier still has ample opportunity to sell his system. In the first place the architect is not required to adopt the specifications *in toto*. Architects and engineers are trained professionals and, while it is true that they are not always knowledgeable with regard to pool construction, their general knowledge of the construction industry permits them to make informed judgments on which recirculation system will best serve their clients at the lowest cost.

In the event that specifications have already been issued when Whitten hears of the project, it may attempt to qualify under the "or equal" clause or convince the architect to issue an addendum to the specifications which permits Whitten to bid as an alternate. An architect can waive specifications, and often does so. The decision as to whether a supplier will be permitted to bid or whether a specification will be waived is that of the architect, not that of the specified supplier.

The plaintiff complains that Paddock's specifications go beyond being merely proprietary in that they negatively exclude Whitten's products. For example, Paddock's specifications require ". . . that no screws, slip joints, or mixtures of metal and plastic will be permitted." Screws, slip joints, and plastic are features contained in the Whitten system. In find that these negative specifications are com-

mon business practice and that Whitten engages in this same practice.

The Court of Appeals, in remanding this case for trial, assumed that the "or equal" clause was rendered meaningless by proprietary specifications. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 28 (1st Cir., 1970). I find that the fact is that these specifications can be and have been overcome by vigorous salesmanship efforts. It is further established by the evidence that the architect will waive specifications in order to obtain a better product for his client.

The plaintiff has introduced evidence of instances in which it was excluded from bidding because it could not convince an architect that its product was the "equal" of the defendant's specific system. As pointed out earlier in this opinion, there are differences in the systems upon which an architect could base a decision to specify one to the exclusion of the other. It is clear that Paddock and Whitten are "equal" by some standards and not equal by others. This is evident from the fact that while they perform essentially the same function, they are both patented. The burden is on the supplier who has not been specified to convince the architect that his product is equal for the purposes of the particular project. This reduces itself to a matter of salesmanship.

B. *Controlling Prices in Restraint of Trade*

The plaintiff has introduced no competent evidence to show that the defendant has been able to control prices.

C. *Misrepresentations*

The plaintiff charges that Paddock has engaged in material misrepresentations both as to itself and as to Whitten. The Paddock claim of being in business since 1920 was the subject of a good deal of testimony. The old Paddock of California, a company in business since 1920, when into receivership in 1962. William Baker, the principal stock-

holder of the three present Paddock companies, through his Paddock Pool Builders Equipment Company, purchased from the receiver the name, trademarks, patents, much of the inventory, and the franchise agreements. The cost of this purchase over a 10-year period was in excess of $750,000. Many of the key personnel from the old Paddock company were employed by Baker after the transaction. There is substantial continuity between the old Paddock of California and the present Paddock companies. I find that the defendants have not materially misrepresented their experience in the swimming pool industry.

The plaintiff charges that Paddock has falsely claimed to have a "national swimming program" and that it makes the "only pipeless" swimming pool. The Court finds that these allegations are similarly without merit as misrepresentations.

The defendant's claims with respect to its own technical capabilities and Whitten's technical shortcomings were the subject of exhaustive expert testimony. The Court will not attempt to deal with this evidence in detail. Suffice it to say that both sides of such questions as Paddock's in-pool surge capacity and Whitten's flooded gutter and "cleanability" problems had merit; that interpretation of the data could lead one to either conclusion. I find no material misrepresentation with respect to these claims. Such representations fall more aptly into the category of "seller's talk." The Court of Appeals noted that ". . . Systematic tale-telling coupled with other relevant factors such as conspiracy or monopoly power may constitute an antitrust violation." George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., *supra,* at 29, fn. 3. The evidence did not reveal such "tale-telling."

D. *State University Construction Fund (S.U.C.F.)*

One transaction to which the plaintiff points as an example of anti-competitive conduct of the defendant is that

involving the State University Construction Fund of the State of New York. In 1969 this body commissioned a report on swimming pool construction to be used as a guide for architects in order to provide some continuity among the various projects which were then being planned. The plaintiff contends that the defendant unduly influenced this report.

The preparation of the report was in the hands of outside consultants to the S.U.C.F.—an architect and an engineer. While these men exercised control over the project, the actual preparation and writing of the report was done by a plumbing designer employed by the engineering firm. J. Gregory Horine, Equipment Coordinator for the S.U.C.F., heavily influenced the stainless steel gutter section of the report. Mark Randall, swimming coach at Colgate University and a pool consultant to the S.U.C.F., was also involved in the writing of the report.

The plaintiff charges that Horine and Randall were closely affiliated with Herbert Ellis, president of Paddock Pool Builders, Inc., and that this association resulted in a report that was unduly critical to Whitten and weighted in favor of Paddock. I find that Randall and Horine did influence the report and that this was done with the knowledge, encouragement and cooperation of Herbert Ellis. While it has not been established that Horine and Randall received anything for their efforts on Paddock's behalf in this matter, it is clear that they did not approach the Whitten-Paddock comparison with impartiality.

The report, "Swimming Pool Study—Phase I," was published in September 1969. It showed Paddock in a most favorable light and focused on the weaknesses of the Whitten system. I do not find that there were misrepresentations as to the specific statements made, but I do find that the plaintiff was treated unfairly.

Paddock, aware before publication of its favorable en-

dorsement in the report, asked for and received permission to distribute the pamphlet to dealers and customers. This permission was granted by S.U.C.F. on December 3, 1969 in return for a "hold harmless" agreement by Paddock. The Fund soon became aware of the unfair character of the report and terminated Paddock's permission to distribute it on January 8, 1970. By that time Paddock had distributed in excess of 800 copies.

E. *Threats of Litigation*

Plaintiff's principal example of threats of litigation involves patent infringement. Prior to Whitten's obtaining a patent for its system in 1968, patent counsel for Paddock wrote to Whitten informing it that its design might be infringing the Ogden patent. At the time, Whitten's gutter more closely resembled the I.F.R.S. than it now does. While this patent issue was pending, defendant so informed potential customers. There is no evidence of the use of threats of patent litigation after 1968. I find that this patent issue was a valid one and that the defendant was in good faith in raising it.

Other references to threats of litigation are vague and not sufficiently developed by the evidence to support a finding by the Court. Such threats, where they do appear, are the natural consequence of the vigorous competition in which the parties are engaged. I find that there was not a pattern of anti-competitive conduct based upon such threats.

F. *Massachusetts Department of Public Works Pools*

In 1967, the Massachusetts Department of Public Works began a swimming pool building program. There were five pools to be built in the initial phase of this project. The department retained the architectural firm of Munson and Mallis in Springfield, Massachusetts to design the pools and prepare the specifications. A Pennsylvania architect, Sherman Patterson, associated with the Munson firm, acted as pool consultant.

Mr. Patterson, while he is not related to James Patterson of Lifetime Metal Products, Inc. (Paddock's licensor and franchisee in Ohio), has been associated with the latter Patterson in the past as a pool consultant. Some of the improvements in the Ogden design had been originally suggested by Sherman Patterson to James Patterson prior to the time Paddock became the licensee. This association with the early I.F.R.S. design causes him to view the system favorably.

The specifications for the pools prepared by Patterson were not the I.F.R.S. specifications, but were a variation of the same system which the architect calls the "Sherman Patterson" design. Paddock was listed as a source of supply for the materials. There was an "or equal" clause in the general specifications.

Whitten attempted to be specified at the outset. There is no evidence as to what steps it took prior to the issuance of the specifications, however. After the specifications were out, it attempted to qualify as an "equal." Patterson, as the architect, had the last word in this matter, and determined that Whitten was not an equal.

Later, when another series of pools was being prepared for bid, Patterson listed modifications which the Whitten system would be required to undergo in order to be considered an equal. This change of policy by the architect was in response to repeated attempts by Whitten to get the state to intervene.

Whitten refused to accept these conditions since the modifications would have made its system into the Paddock system. It was not permitted to bid on the second series of pools, but its continued pressure on the Department of Public Works resulted in its being approved as an equal on a third series of pools.

As a result of his long standing association with the Ogden patent, Sherman Patterson was a proponent of the system before Paddock and Whitten arrived on the scene.

This was an unfortunate circumstance for Whitten. From the evidence presented, I find that Patterson's plans and specifications were a product of his experience and professional judgment. He treated Whitten's system in a manner consistent with his duty as project architect. As has been noted throughout this opinion, there are differences in the two systems and those differences provide a valid basis for choosing one over the other. There is no evidence which would support a finding that Patterson was unduly influenced in the performance of his duties in this matter.

The plaintiff introduced evidence which tended to show that Herbert Ellis of Paddock Pool Builders, Inc. had attempted to influence George Sheehan, an employee of the Department of Public Works, who acted as liaison between Massachusetts and the pool consultant firm. The Court finds that Mr. Ellis attempted to give a set of golf clubs to Mr. Sheehan, but that this gift was not accepted. Sheehan was familiar with some of the technical differences between the Whitten and Paddock products. I find that this was the result of vigorous sales efforts which were pursued by the Paddock organization. As the representative of the owner of the pools, Sheehan was the natural target for the I.F.R.S. sales pitch.

G. *Scan Microfilm Incident*

The plaintiff introduced testimony by way of deposition concerning an alleged attempt by Paddock to tamper with the edit which Whitten received from the McGraw-Hill Scan Microfilm Service. Scan provides its subscribers with specifications for construction jobs which have been issued for bid. Whitten's edit called for swimming pool projects with "metal gutters only." There was some evidence of correspondence between Paddock and McGraw-Hill initiated by Paddock's Robert DeRose pertaining to Whitten's edit. The evidence is inconclusive as to what precipitated this exchange between Paddock and Scan. It is

clear that nothing was done as a result of this incident which affected Whitten's Scan edit.

H. *Fort Dix — Fort Devens*

The plaintiff contends that specific anticompetitive conduct by the defendant resulted in the loss of the opportunity to bid on a swimming pool project at Fort Dix, New Jersey. Two projects were to be built by the Department of the Army — one at Fort Dix, New Jersey; the other at Fort Devens, Massachusetts. There was a two-step procedure in the bidding: (1) design proposals were submitted for approval; and (2) once the designs were approved, bids were requested. The design proposals were subject to non-disclosure; i.e. the plans were confidential prior to the opening of the bids.

The Fort Devens job was bid on May 6, 1971. Paddock registered an official protest when the bids were opened and Whitten's bid was low. Its letter of protest, dated April 6, 1971, and delivered at the bid opening on May 6, establishes the fact that Paddock had seen the plaintiff's plans prior to that date and during the period of non-disclosure. There was no explanation as to how this came about. After a period of delay to process this protest, Whitten was awarded the contract.

The plaintiff was required to extend its bid and the payment and performance bonds were issued by its surety company. Whitten was close to its bonding limit with the Fort Devens job and the delay forced by the Paddock protest caused its insurance company to refuse the bond it had requested for the Fort Dix project. I find that Paddock had a right to protest the bid and to consider an appeal through the courts. There has been no showing that the defendant was aware of Whitten's bonding problem or that it protested for the purpose of bringing about such a result.

I. *Tying Agreements*

The essence of the plaintiff's allegation of tying agreements is that the standard Paddock specifications contain a requirement that the source of supply for the recirculation system and accessories shall be a single manufacturer. As with the other proprietary specifications, they are subject to pre-specification competition, and the right of the architect to waive such a specification, to issue an addendum without such a requirement, or to simply refuse to accept specifications *in toto* as offered by the manufacturer.

Further, the use of a single supplier (a specification used by both Whitten and Paddock) is common in the industry to facilitate servicing and warranty claims. The Court finds that there is no evidence that Paddock refused to deal with a potential customer as a result of a refusal to accept all the Paddock accessories with its recirculation systems. On the contrary, there is evidence that other manufacturer's equipment was specified with Paddock's gutter on numerous occasions. I find that Paddock imposes no condition that a customer must buy the entire package in order to purchase the patented I.F.R.S. gutter.

Conclusions

[5] This action has been brought under the treble damage section of the Clayton Act, 15 U.S.C. § 15. Recovery by a private party under this section depends upon its establishing by a preponderance of the evidence: (1) a violation of the antitrust laws; (2) substantial injury to the plaintiff proximately caused by this violation; (3) the extent of damages. Cape Cod Food Products, Inc. v. National Cranberry Association, 119 F. Supp. 900 (D. Mass., 1954).

[6] In order to sustain its burden with respect to Counts I through III of the complaint, the plaintiff must

demonstrate that the defendant has imposed a ". . . restraint of trade or commerce among the several States . . ." 15 U.S.C. § 1. Whether or not a restraint proscribed by the antitrust laws has been shown must be determined by an examination of the particular industry. This rule was first set forth by Mr. Justice Brandeis in Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L.Ed. 683 (1918):

> . . . the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

[7] Certain practices are so repugnant to the antitrust laws that they have come to be considered as *per se* violations. These include such practices as price fixing (United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L.Ed. 1129 (1940)), group boycotts (Klor's v. Broadway-Hale Stores, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed. 2d 741 (1959)), and tying agreements (White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963)). Although allegations were made that price fixing and tying agreements were a part of the defendants' antitrust conduct, the Court found no evidence which would support such claims.

[8] A practice which is not illegal *per se* may nonetheless constitute a violation of the statute if it is an unreasonable restraint on free competition. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L.Ed. 619 (1911). The plaintiff's principal contention of an unreasonable restraint centered around the

defendant's use of proprietary specifications.[1] After careful consideration of all the evidence, I conclude that the use of those specifications in the context of the present case does not violate the antitrust statutes.

There were specific instances of conduct on the part of the defendant which were distasteful to the Court. In this category I include: (1) defendant's attempt through Herbert Ellis to influence the writing of the State University Construction Fund Swimming Pool Study report; (2) Ellis' unaccepted offer of a set of golf clubs to George Sheehan of the Massachusetts Department of Public Works; (3) Ellis' knowledge of the plaintiff's plans for the Fort Devens project despite the fact that the designs were subject to nondisclosure. These kinds of acts, however, do not amount to conduct violative of 15 U.S.C. § 1. This is not to say that there may not be a remedy available to the plaintiff. I find only that the plaintiff has not met its burden under the antitrust statutes.

[9] The plaintiff, in Counts IV-VI, charges that the defendant has attempted to monopolize the market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. To establish an attempt to monopolize there must be a specific intent and a dangerous probability of success.

The requirement of specific intent to monopolize was first announced in Swift & Company v. United States, 196 U.S. 375, 25 S. Ct. 276, 49 L.Ed. 518 (1905). The plaintiff points to the conduct of the defendant as demonstrating this intent. From the findings I have made with respect to the activities of the defendant, I conclude that no such intent to monopolize has been shown.

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[1] See several recent cases also dealing with the issue of proprietary specifications: Kendall Elevator Co., Inc. v. LBC & W Associates, 350 F.Supp. 75 (D.S.C., 1972); Federal Sign and Signal Corporation v. Bangor Punta Operations, Inc., 357 F.Supp. 1222 (S.D.N.Y., 1972); Security Fire Door Company v. County of Los Angeles, 484 F.2d 1028 (9th Cir., 1973).

> Neither rough competition nor unethical business conduct is sufficient. The requisite intent to monopolize must be present and predominant. American Football League v. National Football League, 205 F. Supp. 60, 65 (D.Md.1962), aff'd 323 F.2d 124 (4th Cir., 1963).

Swift & Company v. United States, *supra*, further requires that a dangerous probability of monopoly exist in order to establish an attempt.

> But when that intent and the consequent dangerous proability exist, this statute . . . directs itself against that dangerous probability as well as against the completed result. *Id.* 196 U.S. at 396, 25 S.Ct. at 279.

It is clear from the size of the public swimming pool market (27,150 pools built from 1966 to 1971), that no such dangerous probability of monopoly exists.

Plaintiff has failed to establish by a preponderance of the evidence that the defendant has committed those violations of the antitrust statutes alleged in the complaint. In view of this finding on the issue of liability the Court need not reach the question of damages. However, in order to complete a full consideration of this matter, the Court will enter its findings thereon.

Damages

Even if the plaintiff had met its burden as to anti-competitive practices that it had alleged, the evidence relating to damages left much to be desired. During discovery, Whitten had indicated that it was relying on a specific list of damage jobs for which it had been deprived of contracts as a result of the defendant's conduct. This list was comprised of 41 pool jobs as the result of an order of the Court dated November 19, 1971. The plaintiff offered no evidence of the reasons for losing the specific jobs; it seemed to rely upon its general proof of Paddock's conduct to supply the element of causation. Although the plaintiff did not address its proof to the "damage" jobs,

the defendant introduced evidence either by live testimony or designated deposition which tended to rebut the plaintiff's allegations of anti-competitive practices with respect to the specific jobs.

Whitten's proof on the measure of damages was introduced through a certified public accountant, Seymour Levinson. Mr. Levinson, Whitten's accountant since 1972, had devised a different theory of damages. He had had no previous antitrust damage experience, but he was familiar with the calculation of business interruption damages for insurance purposes.

Levinson used the specifications for 339 jobs which had been given to him by the plaintiff. These represented the total number of jobs of which the plaintiff had knowledge during the period from 1965 through November, 1971. The plaintiff had informed the accountant that of this total number, 117 contained specifications which were "competitive" and 222 were "restrictive" (i.e. Paddock's proprietary specifications). Levinson subtracted 15% of the jobs — a figure which Whitten had told him represented the number of jobs which are never built. He computed a "success rate" of 46.5% on the competitive specifications. This success rate was then applied to the total market to arrive at Whitten's total share of the market if all the specifications had been competitive. It was assumed that the only two competitors in the field were the plaintiff and the defendant. The 339 jobs were all stainless steel gutters and they had come to Whitten's attention principally through the plaintiff's Scan Service edit.

To establish the total market for all stainless steel gutter projects, Whitten's and Paddock's sales were combined. From this total was subtracted 16.85% which represented the plaintiff's private sales and which Levinson assumed to be Paddock's private sales. The total market, then, was $30,773,653.00. Whitten's share should be 46.5% or

$14,309,749.00. From the $14,309,749.00 Levinson subtracted the plaintiff's actual sales, $1,871,467.00 and arrived at total lost sales of $12,438,102.00. He determined a net before tax profit percentage by taking the actual profit which Whitten had, plus all its legal expenses, and one-half the salaries of George Whitten and his assistant for the period in question. This was what Whitten estimated was spent to counter the anti-competitive activities of the defendant. Thus computed, the profit percentage was 5.8%. [Without salaries and legal expenses added back in, the figure would have been 2.8%.] 5.8% of $12,438,102.00 gives a total damage figure of $721,410.00.

The Court finds that this theory of the measure of damages is unsound in several respects. Whitten had informed Levinson that the total market for stainless steel gutters included only Paddock and Whitten. While it would not be unreasonable to conclude that only the plaintiff and the defendant are actively engaged in the manufacture of prefabricated stainless steel recirculation gutters, this Court has found that the market for such systems includes the entire public swimming pool market and is not coextensive with the number of jobs which Whitten and Paddock have been able to secure. The lack of comparability of Paddock and Whitten was not factored into the theory. Paddock has a much more extensive manufacturing facility and a larger product line. It includes a nationwide franchised dealer organization as well as a contracting company which builds a large number of public and residential pools. There was no evidence as to what part of Paddock's business deals with the I.F.R.S. gutter.

Mr. Levinson assumed from the information provided by Whitten that, but for the 15% of the jobs which were never built, all the rest of the jobs not awarded to Whitten went to Paddock. I find that this was not the fact; that some of the jobs went to other contractors or suppliers.

Further, it was established that some of those jobs which were classified as "restrictive" for purposes of the damage theory were later subject to addenda approving the plaintiff as a qualified bidder. All of the jobs in the list of 339 included an "or equal" clause. Finally, there are several jobs in the list of "restrictive" specifications which provided for both Whitten and Paddock bids. These clearly belonged in the "competitive" list.

[10] It is well settled that damages need not be demonstrated with absolute certainty and this is especially true in antitrust cases. Momand v. Universal Film Exchanges, Inc., 172 F.2d 37 (1st Cir., 1948).

> . . . while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although th result be only approximate. Story Parchment Co. v. Paterson Co., 282 U.S. 555, 563, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931).

The theory of damages advanced by the plaintiff is difficult to separate from the question of liability because of the plaintiff's reliance upon the restrictive/competitive distinction and relevant market in calculating its damages. Had the Court found for the plaintiff on the issues of liability and causation it is clear that recovery would have been for short of the $721,000.00 sought by Whitten.

However, despite the apparent flaws in the plaintiff's theory of damages, there is some evidence before the Court from which it could have computed a reasonable award.

> The law has gone far to ease that burden by permitting proof of losses which border on the speculative, in order to implement the policy of the antitrust laws. Momand v. Universal Film Exchanges, Inc., supra, at 43.

Let me reiterate, however, that my findings on the issue of liability preclude the necessity for such a computation.

In accordance with the foregoing findings and conclusions, the Court orders judgment to be entered for the defendant, without costs.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 68-695
GEORGE R. WHITTEN, JR., INC.
d/b/a WHITTEN CORPORATION
v.
PADDOCK POOL BUILDERS, INC. ET AL.

JUDGMENT

FREEDMAN, D.J.

This action came on for trial before the Court, and the issues having been duly tried and a decision having been rendered in an opinion filed herewith,

It is ordered that judgment be entered for the defendant, that the action be dismissed on the merits, and that neither party recover costs of action.

Dated at Boston, Massachusetts, this 12th day of April, 1974.

(s) FRANK H. FREEDMAN
United States District Judge

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 74-1169

GEORGE R. WHITTEN, JR., INC.,
d/b/a WHITTEN CORPORATION,

PLAINTIFF, APPELLANT,

v.

PADDOCK POOL BUILDERS, INC., et al.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[376 F.Supp. 125 (D. Mass. 1974)]

Before COFFIN, *Chief Judge*,
McENTEE, *Circuit Judge*, and CLARY*,
Senior District Judge.

John E. Lecomte, with whom *Frank T. Barber, III*, *Peter A. Donovan*, and *Lecomte, Shea & Dangora* were on brief, for appellant.
John D. Hawke, Jr., with whom *Jack Lipson*, *Kenneth A. Letzler*, and *Arnold & Porter* were on brief, for appellees.

December 17, 1974

COFFIN, *Chief Judge*. This appeal presents issues arising out of a private antitrust suit brought by George R. Whitten, Jr., Inc. (Whitten) against several associated companies (Paddock).[1] Both Whitten and Paddock manufac-

* Senior District Judge of Eastern District of Pennsylvania sitting by designation.

[1] Paddock of California, Inc. holds a patent on a swimming pool recirculating system and licenses Paddock Pool Equipment Co., Inc. to manufacture the water circulation and filtration systems and other

ture and merchandize prefabricated metal recirculation systems for swimming pools constructed by public agencies. The complaint arises out of Paddock's efforts to persuade architects and engineers to use its proprietary specifications before competitive bidding procedures are undertaken. Whitten's complaint charges that these efforts exceed permissible bounds in that they include false representations, threats of litigation, and tying of accessory products, and that these in combination with an objective of excluding competitors constitute violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and § 3 of the Clayton Act, 15 U.S.C. § 14.

In a prior appeal, the issue was whether the district court properly granted summary judgment for Paddock on the ground that all efforts to induce governmental bodies to take action, notwithstanding the motives of the inducers, were immunized from antitrust liability. We held that the court erred in granting summary judgment. *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1970) (Paddock I). Subsequently, the case was tried to the district court, sitting without a jury, and resulted in judgment for defendants. 376 F.Supp. 125 (D. Mass. 1974).

We leave further delineation of facts to our discussion of particular issues. We shall examine the section 2 monopolization claim first, then the section 1 conspiracy claim, and the Clayton Act tying claim along with other miscellaneous issues where appropriate.

I. *Attempt to Monopolize Under Sherman Act § 2*

Whitten begins its section 2 argument by stating that "the single most important issue in this case bearing upon

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accessories. It also franchises dealers with the right to use its trade names, trademarks, and patents. Paddock Pool Builders, Inc. constructs and installs swimming pools using products of Paddock Pool Equipment Co. All three companies are owned by Baker who is a corporate officer and chairman of the board in each. Baker owns 100% of Paddock Builders, and 70% of Paddock Equipment, but is not actively involved in the management of either company.

plaintiff's allegations that defendants' conduct constitutes an attempt to monopolize in violation of Section 2 of the Sherman Act involves the determination of the relevant product market." Paddock agrees. While such a consensus among the parties is not binding upon us, we also think that a section 2 attempt case, like a monopolization case, requires a definition of the relevant market. We are aware that some authority can be cited to the contrary, principally *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *reh'g denied*, 327 F.2d 478, *cert. denied*, 377 U.S. 993 (1964), but note that most current cases do focus on market definition in attempt cases,[2] and that the status of *Tidewater*, even in the Ninth Circuit, is subject to some uncertainty.[3] The rationale supporting the majority rule appears to us persuasive. To be successful, an attempt case must establish both an intent to monopolize and a dangerous probability of successful monopolization, *see, e.g., Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905) and *American Tobacco Co.* v. *United States*, 238 U.S. 781, 785 (1946); these elements take on meaning only with reference to an actual or potential exercise of power, which in turn must be assessed in the context of a relevant market. The contrary policy argument—that market definition should be eliminated in order to permit the application of sanctions to anti-competitive behavior by

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[2] *See, e.g., Acme Precision Products, Inc.* v. *American Alloys Corp.*, 484 F.2d 1237, 1340 (8th Cir. 1973); *Agrashell, Inc.* v. *Hammonds Products Co.*, 479 F.2d 269 (8th Cir. 1973); *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 415 F.2d 55, 69 (4th Cir. 1969); *Bernard Food Industries, Inc.* v. *Dietene Co.*, 415 F.2d 1279, 1284 (7th Cir. 1969); *Periodical Distributors, Inc.* v. *American News Co.*, 290 F.Supp. 986, 909 (S.D. N.Y. 1968), *aff'd per curiam*, 416 F.2d 1330 (2d Cir. 1969); *H. F. & S. Co.* v. *American Standard, Inc.*, 336 F.Supp. 110, 124 (D. Kan. 1972); *Diamond International Corp.* v. *Walterhoefer*, 289 F.Supp. 550, 576-77 (D. Md. 1968); *United States* v. *Johns-Manville Corp.*, 259 F.Supp. 440, 451-52 (E.D. Pa. 1966).

[3] Cooper, *Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 375, 420-25 & nn. 168, 174, 176, 190 (1974) (hereinafter Cooper).

a single firm which does not approach monopolization — seems unpersuasive. *See generally Cooper, supra* at 408, 414, 435-54.

This brings us to the critical issue of market definition. Swimming pool recirculation systems operate to remove water from the pool for purification, either through a drain in the pool's bottom, or through a gutter which rims the pool at its top. Water enters the gutter either through openings in its side called skimming weirs or by overflowing the gutter lip, and then passes through a filter and chlorinator. In conventional recirculation systems, the water passes outside of the pool proper and the filtered chlorinated water is returned to the pool through pipes built into the pool wall. The Whitten and Paddock systems, however, return the purified water through conduits built into the gutter itself, and thus eliminate the need for buried perimeter piping. Whitten argues strenuously that the relevant market is limited to public swimming pool pipeless recirculation systems, in which both Whitten and Paddock are substantial factors, not the entire market for recirculation systems in the public swimming pool industry, in which even Paddock is a minor figure.[4]

Whitten's argument centers on what it alleges are the realities of competition in the public swimming pool industry, specifically, the incentives to sell an architect or engineer on specifications indicating a particular recirculation system. The argument flows from the assumption that Whitten and Paddock are specialists in public pool recirculation systems, suppliers of patented prefabricated products. As such, they actively seek information, through contacts in the industry or Dodge Reports, a McGraw-Hill

[4] Both parties agree that pipeless recirculation systems of the type supplied by Whitten and Paddock are too expensive to compete successfully for use in most private swimming pools, and thus their market for the purposes of section 2 must be limited to public pools.

service, concerning projects in the design and planning stage. Their major sales effort is the active attempt to convince architects to specify their products. On the other hand, contractors who install conventional perimeter pipe recirculation systems, because they are not specialized suppliers of recirculation systems, have no incentive to expend resources encouraging the specification of a conventional system. This results from the fact that conventional perimeter pipes are not manufactured "products" in the same sense as are prefabricated pipeless systems, and any other contractor could bid and comply with the conventional specifications in a given contract. Thus, argues Whitten, "no conventional gutter manufacturers or suppliers conceivably can be hovering around architects . . . seeking to get their 'products' specified," and "there can be no competition without competitors."

We agree that conventional systems are not manufactured "products" in the same sense as pipeless systems.[5] It may also be true that most suppliers of perimeter pipe systems do not lobby architects and engineers to specify such conventional systems. Before we address this argument directly, we note that Whitten is on weak ground in so concentrating on competition among sellers. A market definition which is confined to the seller's perspective is not meaningful. *United States* v. *Bethlehem Steel Corp.*, 168 F.Supp. 576, 592 (S.D. N.Y. 1958); *cf. United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 392-93 (1956) (Cellophane case). By necessity, definition of "market" must also focus on attitudes and reactions of consumers.

[5] Conventional systems may be constructed from or adorned with galvanized steel, precast stone, aluminum, gunnite, epoxy paint, ceramic tile, or concrete, poured, pneumatically applied, or constructed with masonry. Yet each of these systems is "conventional" to the extent that each is constructed on site and utilizes buried perimeter piping. It is the use of such piping which defines a conventional system, and not the materials from which the system is fashioned nor the particular design.

Indeed, appellants explicitly recognize that "the choice *for buyers* is between pipeless recirculation systems and conventional recirculation systems which are constructed on site and which employ buried perimeter piping." (Emphasis added.) The evidence in this case overwhelmingly justifies that conclusion. Architects and engineers attested to an industry-wide buyers' perception of competition between pipeless and conventional systems.[6] This perception finds substance in the facts, conceded by Whitten, that conventional and pipeless systems are priced comparably, and that there are no constant or predictable price distinctions between the two systems. Significant differences in quality between pipeless and conventional systems are also missing as we explain below. As for differences in use by consumers, Whitten again concedes that the two types of systems are functionally interchangeable, that either can be used in any public pool in the country. The final choice of a pipeless or conventional system is determined by the peculiar needs and desires of owners, architects and engineers, and not by any fixed structural requirements. The market for a product must be defined not by focusing on a single factor alone but by evaluating the reasonable limits of that product's effective competition with other products. *See Brown Shoe Co., Inc.* v. *United States,* 370 U.S. 294, 326 (1962); *United States* v. *E. I. duPont de Nemours & Co.,* 353 U.S. 586, 593 (1957); *Standard Oil Co.* v. *United States,* 337 U.S. 293, 299 n. 5 (1949).[7] Such limits are drawn according to the

[6] Architects hired to plan pools regularly investigate and evaluate the range of alternative designs and components for their constituent parts. They consult with and solicit budget estimates from manufacturers and suppliers of recirculation systems. They seek the expert advice of pool consultants and engineers. They conduct field investigations of both pipeless and conventional gutter systems. They review their own experience with both types of systems.

[7] These cases were decided under provisions of the Clayton Act, 15 U.S.C. §§ 12-27 (1973), but nonetheless offer guidance to market definition under Sherman Act claims. *See United States* v. *Grinnell, Corp.,* 384 U.S. 563, 572-73 (1966).

cross-elasticity of demand for the product in question—the extent to which purchasers will accept substitute products in instances of price fluctuation and other changes.

> "In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monoplization of which may be illegal.
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> * * *
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> "The market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered" *Cellophane case, supra* at 394, 404.

In light of the functional and price interchangeability of pipeless and conventional systems, it appears that the elasticity of demand for pipeless systems is high indeed.

Moreover, even tunnel vision focused exclusively on the efforts of the suppliers of pipeless systems reveals competition to substitute their product for conventional gutter systems. The testimony of Whitten's president confirms the clear implication of Whitten's advertising and intra-office memoranda, that sales efforts with architects and owners seek to demonstrate Uniflow's superiority to other gutter systems. We take note also of the fact that there are specialized pool contractors which have an interest in and do seek the specification by name of their swimming pool designs, and therefore of the conventional systems they incorporate.[8] In addition, several swimming pool filter manufacturers and distributors offer architects a complete filtration equipment package designed to operate with con-

[8] Indeed, the evidence shows that the Whitten Uniflow is not, strictly speaking a "manufactured product", but is constructed on site, like conventional systems, from materials acquired by Whitten: steel, the gutter's plastic return flow conduit, the plastic gate, the inlets and locking devices as well as other parts.

ventional recirculation systems, and, according to a former Whitten manufacturing representative, counsel "with the architects and engineers on the design of the concrete or pneumatically applied concrete gutters." Thus, even when we adopt the supplier's perspective advanced by appellant, we find insufficient evidence to displace the district court's finding that there is "vigorous competition among suppliers and manufacturers to get specified," and that it is "[b]efore the specifications are issued [that] competition is keenest." 376 F.Supp. at 130.[9] Therefore, whether we look to consumers or suppliers, we find vigorous competition and interchangeability between conventional and pipeless systems.

Appellant argues that if competition between pipeless and conventional recirculation systems suggests, as it does, a market definition encompassing both types of systems, the peculiar characteristics of commerce in pipeless systems render it a recognizable submarket within the meaning of *Brown Shoe, supra:*

> "[W]ithin [a] broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes . . . The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized venders."

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[9] The argument for a market definition encompassing both pipeless and conventional systems would have been more difficult to accept had we concluded that there is no effective competition between the two systems before product specification, since the evidence suggests that competition between the two systems attenuates after specification, despite the theoretical ability of conventional systems to qualify under the "or equal" clause.

Brown Shoe, supra, 370 U.S. at 325. *See United States* v. *Grinnell Corp.,* 384 U.S. 563 at 572 (1966); *Cellophane case, supra,* 351 U.S. at 393-95.

Of course, mere physical differences between one product and others will not alone isolate that product in a separate submarket. There is "no barrier to combining in a single market a number of different products or services where their combination reflects commercial realities." *Grinnell, supra,* 384 U.S. at 572. But a real and outstanding product superiority will define a separate submarket for antitrust purposes.

An example of such superiority was found in *Grinnell, supra,* where the Supreme Court held that insurance company accredited central station fire and burglar protection services which receive automatic alarm signals and take protective action constitute a separate submarket far superior to nonaccredited systems utilizing watchmen, audible alarms, or similar devices. 384 U.S. at 573-75. And professional world championship boxing contests attract such extraordinary attention and revenues as to achieve a quality sufficiently different from other boxing matches to constitute a separate market. *International Boxing Club of New York* v. *United States,* 358 U.S. 242, 249-51 (1959). *Cf. duPont, supra,* 353 U.S. at 594; *Bethlehem, supra,* 168 F.Supp. at 589. Admittedly, these are distinctions in degree, not in kind. No objective criterion tells us that Rolls Royce competes with Mercedes but not with Volkswagen. *Cf. United States* v. *Grinnell Corp.,* 236 F.Supp. 244, 253 (D.R.I. 1964), *decree modified,* 384 U.S. 563 (1966); Cooper, 72 Mich. L. Rev. 375, 381 n. 25 (1974). But that recognition shows only the difficulty of our task, not its impropriety.

Appellant points out that pipeless systems, by eliminating buried perimeter piping, save excavation and maintenance costs, permit greater design flexibility, and outlast conventional systems two to three times. Yet despite these fea-

tures, over ninety-seven per cent [10] of the public swimming pools built in the United States between 1966 and 1971 utilized conventional systems. This court has already recognized that the market for pipeless systems is relatively new and expanding, 424 F.2d at 27, and we accept the conclusion of the district court that pipeless systems have made "significant inroads" into the recirculation system market. 376 F.Supp. at 127. But in light of the testimony of some architects that they clearly prefer conventional to pipeless systems, and of others that they are indifferent as between the two, we are unable to predict that the emergence of pipeless systems heralds the obsolescence of conventional systems, or even poses a substantial threat. Thus the peculiar qualities of pipeless systems do not describe a separate submarket.[11]

Moreover, we note that the product superiority standard is not a discrete criterion of market definition. Rather, it

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[10] Of 27,150 public pools built in the United States between 1966-1971 only a little over 800 (or 3%) utilized pipeless recirculation systems. This figure, taken from Hoffman Reports and relied upon by the parties and court below, is challenged here by appellant on the ground that the figure should be somewhat reduced to reflect the fact that certain American Public Health Association standards (requiring Whitten-Paddock type overflow recirculation systems) apply only to pools larger than 1600 square feet. Some public pools may have been smaller. But Whitten's president deemed "extremely conservative" a similar report of 25,000 for 1964-1968; and if large semi-public pools of hotels, clubs, and apartment houses, on which pipeless systems may be used, be included, Paddock estimates that the relevant figure would increase from 27,150 to over 113,000, reducing its share of the market from 2.7% to 0.6%. We conclude that use of the 27,150 figure was not unfair to Whitten.

[11] The Supreme Court recognized in the *Cellophane case* that no competitor of cellophane combined its qualities of transparency, strength, and low cost, yet included such competitors in its market definition in light of their functional interchangeability. 351 U.S. at 398-99. *See Acme Precision Products, Inc.* v. *American Alloys Corp.*, 484 F.2d 1237, 1243 (8th Cir. 1973); *cf. Bendix Corp.* v. *Balax, Inc.*, 471 F.2d 149, 161-62 (7th Cir. 1972), *cert. denied*, 414 U.S. 819 (1973). Conventional recirculation systems are interchangeable with pipeless systems for 100% of their uses.

is one indication that a product may enjoy a specialized clientele and thus inelastic demand.[12] Yet in the case at hand, ninety-seven per cent of the "consumers" of recirculation systems prefer conventional systems to their functionally equivalent pipeless counterpart. Nor do pipeless systems enjoy any special industry recognition, as did accredited protective systems in *Grinnell*. Neither the National Swimming Pool Institute, nor the American Public Health Association, nor the Massachusetts Sanitary Code standards draw any distinction between conventional and pipeless systems.[13] In short, there is no evidence that pipeless systems cater to a discrete class of consumers.

We therefore cannot say that the district court erred in holding that Whitten and Paddock compete for a share of the public swimming pool market. We believe this conclusion dispositive of Whitten's claim under section 2 of the Sherman Act. To sustain its charge that Paddock has attempted to monopolize the market for recirculation systems, Whitten must succeed in linking Paddock with both an intent to monopolize and a pattern of activity creating a dangerous probability of monopolization *See Cellophane case*, 351 U.S. at 393; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946); *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905). An intent to monopolize

[12] Examples are central station protective services specially accredited by insurance companies in *Grinnell;* men's, women's, and children's shoes attracting separate groups of customers in *Brown Shoe*, *supra*, 370 U.S. at 593-95; and gospel music devotees in *Affiliated Music Enterprises, Inc.* v. *SESAC, Inc.*, 268 F.2d 13, 15 (2d Cir.), *cert. denied*, 361 U.S. 831 (1959).

[13] Whitten invokes a Scan (a McGraw-Hill microfilm service) survey, which found that only 54 of 339 pool projects specifying pipeless system also specified conventional systems as an alternative, to support the assertion that many architects will accept no alternative to a pipeless system. But this evidence shows only that *after deciding* to specify a pipeless system, most architects will accept no alternative. It does not contradict the evidence of record that most architects will specify a pipeless system on some projects, conventional systems on others.

may be shown by direct evidence. *Cf. United States* v. *Corn Products Ref. Co.*, 234 F.Supp. 964, 978 (S.D. N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1919). The direct evidence of intent mustered by Whitten at most shows that Paddock intended to eliminate Whitten from the market, which would raise Paddock's share from 2.7 per cent to 3 per cent. Intent may also be inferred from conduct. *See, e.g., Union Leader Corp.* v. *Newspapers of New England, Inc.*, 189 F.Supp. 125, 140 (D. Mass. 1959), *aff'd in part*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). Yet the actions of Paddock assigned by Whitten as violative of section 2 are directed at Whitten, and only indirectly at suppliers of conventional recirculation systems, and thus suggest an intent no greater than that proved explicitly. *Cf. American Football League* v. *National Football League*, 205 F.Supp. 60, 65 (D. Md. 1962), *aff'd*, 323 F.2d 125 (4th Cir. 1963). For similar reasons, Paddock's alleged conduct cannot be said to create a dangerous probability of successful monopolization. *See Syracuse Broadcasting Co.* v. *Newhouse*, 236 F.2d 522, (2d Cir. 1956); *Keco Industries, Inc.* v. *Borg-Warner Corp.*, 334 F.Supp. 1240, 1245 (M.D. Penn. 1971); *United States* v. *Charles Pfizer & Co., Inc.*, 245 F. Supp. 737, 739 (E.D. N.Y. 1965).[14] We therefore

[14]Whitten also claims that Paddock violated the Anti-trust Acts by tying sales of accessory products to sales of its recirculating system. The alleged infraction is said to take place through the specifications particularizing a description of the accessories that can be met only by Paddock. *See Paddock I*, 424 F.2d at 28. But Whitten could not prove tying without establishing power to influence the market in the tying product, *Fortner Enterprises* v. *U. S. Steel*, 394 U.S. 495, 505-06 (1969); *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 6-7 (1956). The district court having found no price, function or significant quality advantage, the necessary conclusion is that Paddock had no competitive advantage in swimming pool recirculation systems. *See Capital Temporaries, Inc.* v. *The Olsten Corp.*, ___ F.2d ___, Docket No. 74-1077, slip op. 127-28 (3d Cir. Oct. 17, 1974).

Were this fact not dispositive, the claim here would nonetheless have been defeated by the district court's factual finding that no

affirm the district court's conclusion that Whitten has not proven a section 2 attempt-to-monopolize violation.

II. *Conspiracy in Restraint of Trade Under Sherman Act § 1*

Even though the Paddock activities do not rise to the point of constituting a dangerous probability of monopoly in the relevant market, they must also be assessed against the standard of 15 U.S.C. § 1. Did they amount to a combination or conspiracy in restraint of trade?

The conduct alleged was of four general types. The first was concerted activity by the Paddock companies and their franchised dealers to "get specified", i.e., to influence buyers of public swimming pools to draw up gutter specifications for bidding purposes that only Paddock could meet. The second was a series of misrepresentations, some unfairly presenting a favorable picture of the Paddock organization and gutter system, and others unfairly presenting an unfavorable picture of the Whitten organization and gutter system. A third variety of conduct was the making of threats of patent litigation to various potential customers of Whitten. Finally, there were several efforts made by Paddock using gifts and pressure, to influence prospective buyers and a provider of services to Whitten's disadvantage. These include an attempt to obtain a swimming pool report favorable to Paddock and unfavorable to Whitten by the State University Construction Fund of New York (SUCF);

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tying agreement existed. Given that the major competition takes place before the specifications are adopted, the existence in Paddock's specifications of requirements for its own accessory products is not probative. The key facts are, as the district court found, that Paddock does not refuse sale of its recirculating system if others' accessory parts are specified nor does it condition sale upon specification of its accessory parts. 367 F.Supp. at 134. The district court's factual findings were supported by the evidence and require affirmance of the holding that there was no tying because there was no "agreement [to] sell one product . . . only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier", *Northern Pacific R. Co.*, *supra* at 5-6.

an effort to gain the patronage of the Massachusetts Public Works Department and to exclude Whitten from any of its contracts; interference with Whitten's attempts to obtain contracts at Fort Dix and Fort Devens; and an endeavor to persuade Scan Microfilm Service, a distributor of construction contracts information, to cease providing Whitten with data tailored to Whitten's needs.

The district court made a number of specific findings.[15] As to efforts to induce architects and buyers to use Paddock specifications, it found that such a practice was customary in the industry; that "negative" specifications are common; that both Whitten and Paddock engaged in the practice; that the adoption of specifications was up to the judgment of architects, who also had the power to waive specific technical requirements and accept equivalent substitutes; that the promoting of proprietary specifications was essentially a "matter of salesmanship". As to the alleged misrepresentations of Paddock's experience and product, the court found them either without substance or not material, being in the category of "seller's talk", as was Paddock's downplaying of the performance of Whitten's gutter system. The court found the major instance of threats of patent litigation to have involved a valid issue, raised by Paddock in good faith; other evidence of threats, the court found, was less than clear and reflected only vigorous competition.

The specific findings of the court relating to the various alleged efforts of Paddock to interfere with Whitten's receipt of contracts and services were more ambivalent.

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[15] Whitten claims that the district court erred in excluding certain documentary exhibits, letters addressed to and received by Paddock, as failing to meet the business records exception to the exclusion of hearsay. Whitten is incorrect in pointing us to Massachusetts' law. 28 U.S.C. § 1732 controlled the district court in this matter. Not only was there no showing that the communications were authored or "made" in the normal course of business as required by § 1732, but there is here no showing of prejudice which would entitle Whitten to relief were the district court in error.

While the SUCF report contained no specific misrepresentations, the court found that two persons associated with the preparation of the report were "encouraged" by a Paddock official, that they did influence the report, that the report treated Whitten unfairly, and that Paddock distrubuted 800 copies before SUCF revoked Paddock's permission to distribute. Again, although the court found that specifications favoring Paddock and hostile to Whitten excluded Whitten from bidding in the first two or three series of pools planned by the Massachusetts Department of Public Works, it also found that the specifications were the product of the judgment, not unduly influenced by Paddock, of the pool consultant—who had helped develop Paddock's design prior to its obtaining a license from the inventor. Nevertheless, the court also found that Paddock's official, Ellis, had attempted to give a set of golf clubs to an employee of the Massachusetts Department of Public Works connected with the program.

The court considered evidence of an alleged attempt by Paddock to "tamper" with the type of job specifications service provided by the Scan Microfilm Service for Whitten, limited to "metal gutters only". It found the evidence inconclusive "as to what precipitated [the] exchange between Paddock and Scan" and observed that no action was taken to affect the services rendered to Whitten. As to the Forts Dix and Devens jobs, the court found that although Paddock had seen Whitten's plans prior to the bid opening for the Devens job, it had a right to protest the award to Whitten. The delay in processing this protest — which proved to be unsuccessful — led to Whitten's insurer refusing to issue a bond for the Dix project; but the court held that there had been no showing that Paddock knew of Whitten's bonding problem or filed its protest to bring about the insurer's action.

The court concluded its section 1 findings by noting its distaste for Paddock's efforts to influence the SUCF report, Ellis' aborted effort to give golf clubs to the Massachusetts Department of Public Works employee, and Paddock's sneak preview of Whitten's bid plans for the Devens project. It added, however, that while such acts "do not amount to conduct violative of 15 U.S.C. § 1.[,] [t]his is not to say that there may not be a remedy available to the plaintiff. I find only that the plaintiff has not met its burden under the anti-trust statutes." 376 F.Supp. at 136.

We begin our analysis with an issue which was not specifically addressed by the district court: whether or not there was a combination or conspiracy within the meaning of the Sherman Act, among the three Paddock companies and their franchised dealers. The district court seems to have assumed the point as proven, for it devoted its analysis to the question whether the actions engaged in did or did not amount to a restraint of trade. Indeed, appellees have not briefed the issue, but have argued that even if sufficient proof of conspiracy is assumed, Paddock's conduct did not violate section 1.

While the doctrine recognizing what we might call "thin" conspiracies among corporations associated in one business enterprise has not been free of criticism,[16] it seems alive and well. The doctrine, emerging from *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), has been reaffirmed over the following two decades. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

We are satisfied that under the *Yellow Cab* doctrine, the evidence is sufficient to portray a plurality of actors con-

[16] *See, e.g.*, Handler, *Twenty-Five Years of Anti-Trust*, 73 Col. L. Rev. 415, 452-53 (1973).

certing their efforts toward a common end. In addition to the facts set forth at the outset of this opinion, *see* n. 1, bearing on the intercorporate relationships, we note the omnipresence in the evidence of Mr. Ellis. Mr. Ellis is president of Paddock Builders (Builders) and on the Board at Paddock Equipment. On behalf of Builders, Ellis seeks to get the Paddock system specified and installed, using among other things, brochures which he helped to prepare, printed by Paddock Equipment and at least one brochure printed by Paddock of California. Builders also holds sales meetings to train its own salesmen and sometimes those of other dealers; one of the instructors is vice president of Paddock Equipment. Ellis and his salesmen sometimes show a film prepared by Paddock Equipment. It is clear that the three Paddock companies are not competitors, but rather vertically affiliated for the purpose of marketing the Paddock system.

In determining whether the combination on the part of the Paddock companies and their dealers was one in restraint of trade, we confront the findings of the district court. Whitten acknowledges that our standard of review is limited to discovering "clearly erroneous" findings of fact and legal error in the district court's conclusions. At the same time it charges the district court with having "dismembered" and "fragmentized" Whitten's proof and asks us to focus on Paddock's overall scheme, stating that we are "in the same position as the district court to discern the truth from the unmistakably clear facts." While we shall have more to say about Paddock's overall scheme in the sense of motive, we are conscious of not being in the same position as the district court. Our review of the facts is, as we have often said, limited by the "clearly erroneous" standard under Rule 52(a). *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 393-99 (1948); *Custom Paper*

Products Co. v. *Atlantic Paper Box Co.*, 469 F.2d 178, 179 (1st Cir. 1972).[17]

With this as our standard, we have little difficulty in dealing with the court's findings as to most of the conduct charged to Paddock. The attempt to gain adoption by architects of a supplier's proprietary specifications was found to be a common practice, a "matter of salesmanship". Indeed, Whitten does not dispute this, but argues at length that there is a significant difference between A's promoting a specification that calls for features which A's product has and his promoting one that adds "and no product which does the job differently." [18] We concede that there may be a difference in the degrees of advantage gained by the latter "negative" specification (which the district court found common in the industry), but, absent coercion, we are not able to say that the district court was clearly wrong in denominating this conduct a matter of salesmanship.[19]

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[17] Similarly, failing to recognize the boundaries of procedural liberality, appellant asks us to substitute our own findings as to territorial restrictions based on a contractual agreement between Paddock and its franchise dealers. We decline the invitation. No allegation of territorial restrictions was made in the complaint, no findings of fact were sought by the plaintiff, and no objection raised below to the court's failure to make relevant inquiry. The district court was not apprised of the appellant's belief that such findings were warranted nor of its theory. Rule 46 F. R. Civ. P. forecloses relief under such circumstances. Wright and Miller, Fed. Practice and Pro. § 2472.

[18] Whitten, to illustrate a "bad" specification gives us an example of a potential Paddock-like addition, indicated in italics, to its system's description:

> "Drainage channel of gutter shall be completely covered with removable grill which will not allow entrapment of bather's limbs, and will prevent large debris from entering gutter drain channel, and *systems which do not provide a covered and removable grill shall not be considered equal.*"

[19] Whitten asserts that the mere showing of adoption of proprietary and exclusionary specifications is sufficient to establish a violation of the antitrust laws. No case law supports this thesis. Certainly not *Paddock I*, 424 F.2d 25, which held only that if facts surrounding adoption of proprietary specifications indicated abuse of the competitive system a claim would be stated. Success would have to be

Moreover, the bulk of Paddock's so-called restrictive or negative specifications were arguably linked to a functional consideration.

The court's findings as to alleged misrepresentations, both as to Paddock's superiority and as to Whitten's inferiority are not clearly erroneous. These were, in the main, representations which are capable of two interpretations, one of them in accord with the truth. Whitten's arguments as to some of these diminish to the trivial. As for the threats of patent litigation, the evidence is far from sufficient to demonstrate clear error in the district court's findings.

This leaves us with the findings, which we have termed ambivalent, concerning Paddock's efforts to interfere with Whitten's business prospects or services. Clearly the court found that distateful efforts had been made to slant the SUCF report, to influence by improper means the Massachusetts Department of Public Works, to sneak preview the Fort Devens bid, and to cut off the tailored "metal gutters only" Scan Microfilm Service. But the court found that Whitten had, after all, gotten the contract (Fort Devens) and continued to receive the service (Scan); that Paddock was not the operative cause of decision (Fort Dix bond

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premised, however, on showing either a conspiracy with those adopting the specifications, neither claimed nor shown here, *Kendall Elevator Co., Inc.* v. *LBC&W Associates of S.C., Inc.*, 350 F.Supp. 75 (D. S.C. 1972), or that coercion by the defendant or the absence of available pre-specification competition inhibited selection. *Security Fire Door Co.* v. *County of Los Angeles*, 484 F.2d 1028, 1030-31 (9th Cir. 1973); *Federal Sign & Signal Corp.* v. *Bangor Punta Operations, Inc.*, 357 F.Supp. 1222, 1240 (S.D. N.Y. 1973). But as we have indicated, Whitten on remand did not succeed in showing that free choice was not exercised by architects and engineers who adopted the Paddock specifications. The fact, argued again in appellant's reply brief, that architects and engineers may prefer to adopt existing specifications than to create their own only serves to illustrate that Paddock was well advised in putting in its effort at an early stage.

refusal; Massachusetts Public Works contracts); and made no finding as to any harm stemming from the SUCF report. No finding as to Paddock's motivation was made, although statements of the vocal Ellis were introduced into evidence that he told Whitten's president, "George, we will run you out of business if it takes all the money we have", and that he urged Paddock's salesmen to "control, hold, gouge, coerce . . . get specified, stay specified and obtain a contract."

The question posed, after receiving and accepting the specific findings of the district court, is whether this aggregation of dirty tricks, played by those with little market power, which were not demonstrably successful, if aimed at eliminating other parties from competition (or, as some of the evidence indicates, principally Whitten), constituted a violation of 15 U.S.C. § 1. This raises, as appellant recognizes, the question whether such a combination of conduct and motive amounts to conduct which is illegal per se. If so, the proper course for us is to remand for further findings as to motivation. If not, our course is to apply the "Rule of Reason" to the findings of the district court.

At this point, we are struck by the difficulty of analysis. Section 1 is a broad charter, stemming from a common law heritage, but taking shape from eight decades of interpretation by the Supreme Court and other tribunals. Most generalized anti-competitive conduct is subjected to a "rule of reason" analysis, involving, among other factors, a study of the consequences of the conduct on the affected market. *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231 (1918); *United States* v. *Topco Associated, Inc.*, 405 U.S. 596, 610 (1972). But the landmark cases often concern giants in an industry which have been charged with now classic forms of distorting market conditions—price

fixing,[20] group boycotts,[21] market allocation,[22] restrictive practices involving patents,[23] and certain competition-preclusive conduct by monopoly groups.[24] Such practices are now recognized as being illegal per se; no assessment of their actual effect is required because it is assumed that the practice is inherently subversive of competition. On the other hand, analysis of market power as opposed to effect is required for most per se violations[25] although not for price fixing; in this latter unique realm anti-competitive purpose, without more, has been said to be sufficient to invoke the sanctions associated with section 1 violations.[26]

The argument presented here is that the same standard of judgment applicable in the price fixing situation should apply in the instant case where several allied corporations, accounting for a small portion of sales in the public swimming pool market are alleged to have engaged in a variety of unfair business practices, arguably aimed at taking business away from all others. But the major allegations do not charge and Whitten has not established actions amounting to attempted price-fixing or any other conduct heretofore held illegal per se. Is the Sherman Act applicable to the kind of conduct alleged here? If applicable, is the presence of a purpose to eliminate competition (or a competitor) without evidence of significant potential or actual effect on the relevant market sufficient to constitute a violation of section 1? If the "rule of reason" applies, how serious or broad must be the effects before antitrust sanctions apply?

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[20] *E.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

[21] *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

[22] *United States* v. *Topco Associated, Inc.*, 405 U.S. 596 (1972).

[23] *International Salt Co.* v. *United States*, 332 U.S. 392 (1947).

[24] *United States* v. *Griffith*, 334 U.S. 100 (1948).

[25] *See, e.g.*, Cooper at 423 n. 182, and discussion of tying, *supra* at n. 14.

[26] *United States* v. *Socony-Vacuum Oil Co., Inc.*, *supra*, 310 U.S. at 225-26 n. 59.

We are not willing to say that the Sherman Act is not applicable to the range of unfair competitive methods evidenced here. As the legislative history of the Sherman Act reveals, the draftsmen recognized that there was no finite catalogue of unfair practices which could be the devices of a conspiracy to restrain trade. Cooper at 430. At the same time we see no license to proclaim unethical efforts to influence buyers, advisors to buyers, or suppliers of competitors to be illegal per se under the antitrust laws. Such actions have long existed, but have not as yet joined the per se pantheon recognized by the Supreme Court.[27] This is understandable, since the policy reasons dictating a per se approach are noticeably absent when we consider such conduct as is evidenced here.

The actions carried on by Paddock do not involve the complex systematic influences on production, price formation, and market allocation which a court feels ill equipped to assess. The nexus between the practice and a tendency to monopoly is not so close and likely that the certainty of a clear and absolute standard is preferred to a case-by-case analysis. And, to the extent that the lessening of the volume of litigation is a factor in adopting a per se classification, the extension of such to what Judge Frankel has termed a "garden variety" competitive business tort. *Vogue Instrument Corp.* v. *Lem Instrument Corp.*, 40 F.D.R. 497, 499 (S.D. N.Y. 1966), would not only be a powerful stimulus to federal antitrust litigation, but would be so in a field of law traditionally dealt with by state courts.

We are also concerned over the implications of what has been termed "judicial crime making". Cooper at 457. Were we to declare the conduct and intent arguably evidenced in this case a per se violation of section 1, we would confront

[27] Appellant, to support its case for per se treatment of Paddock's conduct, chiefly relies on leading Supreme Court cases in this pantheon. So to rely, without addressing the question why the list should be expanded, is to assume the point to be proven.

initially the problem of formulating a neutral definition. If we said that the range of practices engaged in here amounted to such a violation, this would be an ad hoc judgment, carrying little precedential value but spawning future efforts in similar but somewhat varied circumstances to pin the same label. Even if we were to identify one or several particular practices, we would be elevating to a federal crime what has previously been attacked on the basis of state law or civil penalty. In so doing, we would run the risk of overbreadth, encompassing conduct which fosters competition; of weakening, through making available sanctions which may in practice be avoided, the deterrent effect of the antitrust laws; of subjecting defendants to captious resort to treble damage suits, with evaluation of subjective intent being the chief determinant, and varying from jury to jury.[28] Moreover, extending a per se classification to the kinds of competitive torts confronted here would go far to yielding to a long resisted temptation to create a federal common law of unfair competition.[29]

Appellant seeks added support from four cases involving "unusual fact situations, generally not present in antitrust conspiracy cases."[30] All of them deal with the efforts of former employees of the plaintiff to drive the latter out of business by such means as hiring key personnel, using confidential information, raiding plaintiff's customers, disparaging plaintiff and its product, etc. All of them held that such conduct was illegal per se under section 1.

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[28] *See* Cooper at 457-62.

[29] *See* cases at Cooper, p. 454, n. 317.

[30] *Perrytown Wholesale, Inc.* v. *Pioneer Distributing Co.*, 353 F.2d 618 (10th Cir. 1965); *Atlantic Heel Co.* v. *Allied Heel Co.*, 284 F.2d 879, 885 (1st Cir. 1960); *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir. 1932), *cert. denied*, 286 U.S. 552 (1932); *C. Albert Sauter Co.* v. *Richard S. Sauter Co.*, 368 F.Supp. 501 (E.D. Pa. 1973).

The two oldest progenitors of this small family were our own decisions. In *Albert Pick-Barth* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932), dealing with a case where the defendant was allied with other corporations, collectively a dominating factor in the trade in which plaintiff was engaged, we said that, "intent . . . to eliminate a competitor . . . and thereby suppress competition . . . is a violation of section 1 . . . ." *Id.* at 102. In *Atlantic Heel Co.* v. *Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960), dealing with allegations of similar but more extreme conduct by a leading concern in the trade, we reversed a judgment of dismissal for failure to state a claim, and held the allegation of intent sufficient to state a per se claim under the circumstances. While the writer of the opinion, Judge Hartigan, discounted the significance of the size and influence of the defendant in *Pick-Barth*, *id.* at 881. Judges Woodbury and Aldrich concurred but declined to do so on the basis of the *Pick-Barth* rule. *Id.* at 885.

Perrytown Wholesale, Inc. v. *Pioneer Distributing Co.*, 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966), relied largely on *Pick-Barth* and *Atlantic Heel*. The most recent case, *C. Albert Sauter Co.* v. *Richard S. Sauter Co.*, 368 F.Supp. 501 (E.D. Pa. 1973); *appeal dismissed pursuant to Rule 42(b) of F.R.A.P.*, No. 73-2003 (3d Cir. Apr. 4, 1974), relied on all three.

Thus if the instant case is of the genre of this family of four, we are the chief authority for appellant's contention that Paddock's actions and motivation constitute a per se violation, without considering any impact on competition. We acknowledge, forty-two and fourteen years later, that we have some doubts about our pronouncements. It is, first of all, clear that we have only two lineal descendants in all these years and we cannot believe that sharp practice has been so rare. More substantively, we share the doubts of Judge Frankel in *Vogue Instruments*, *supra*, that this kind

of conduct does not feel to lawyers like the stuff of antitrust. We have in mind also the criticism voiced not only of the conspiracy analysis in *Pick-Barth* and *Atlantic Heel*, not relevant here, but of our failure to define with any precision the practices held to be a per se violation. *See*, Boone, *Single Corporation Competitive Torts and the Sherman Act*, 2 Ga. L. Rev. 372, 387-89 (1968). More generally, we are impressed by reflecting on the carefully selected considerations which have gone into the declaring of a few practices as per se violations, the danger of casual extension of the category, the value of prior case experience, the availability of the law of torts to deal with such issues as interference with contractual relations and interference with prospective advantage, not to forget the availability of the Federal Trade Commission Act. We have been influenced in our consideration of this issue by a perceptive student case note, analyzing *Sauter* and its predecessors, in 42 Fordham L. Rev. 909 (1973-1974).

Insofar as *Pick-Barth* and *Atlantic Heel* may be said to stand for the broad proposition that unfair competitive practices accompanied by an intent to hurt a competitor constitute per se violations of the antitrust laws, we do not now accept their teaching. We do not feel it necessary to criticize their results on the fact situations there presented —an effort by a defendant which was a significant factor in the market to eliminate a competitor. These were instances, as were *Perrytown* and *Sauter*, of a sharply focused effort to drain off from a plaintiff its key personnel, confidential information, customer lists, and reputation. In the instant case the focus is not on crippling the organization of a competitor but on beating it in the market place. Perhaps the difference is only that between going to the jugular and going to one of the lesser arteries. But the difference, we feel, is enough. Paddock is leaving Whitten as an organization alone; it is concentrating on winning

customers. Each customer is its target. Obviously it has subordinated business morality to its goal of more customers. But we cannot say that such attempts, even though unfair and reprehensible, amount to a per se violation of the antitrust laws.

This conclusion leaves us with the question whether, Paddock's conduct not being a per se violation of section 1, the rule of reason has been satisfied by the district court's findings. We think it has. The dispositive element seems to us to be the effect of Paddock's actions on competition in the affected market.[31] While the relevant market for purposes of section 2 is not necessarily that for purposes of section 1, there still must be some consideration of the effect of a defendant's conduct on some significant part of the market. There is no evidence whatever of harm to general competition in the market. Here at best there was evidence that Whitten lost some contracts. Even Whitten has steadily gained in sales volume, although not so much as it thought it should have gained. The number of competitors has not been affected, nor has the market been fixed or manipulated, so that competition is lessened. Paddock's behavior, however offensive, has not exceeded the bounds of "reason".

Affirmed.

[31] We note again the importance of potential for actual effect on the market even in per se cases except for price fixing. We believe the absence of that potential here would defeat Whitten's claim if we were to approach this conduct as per se unlawful.

United States Court of Appeals
For the First Circuit

No. 74-1169.

GEORGE R. WHITTEN, JR., INC., d/b/a
WHITTEN CORPORATION,

PLAINTIFF, APPELLANT,

v.

PADDOCK POOL BUILDERS, INC., ET AL.,

DEFENDANT, APPELLEES.

JUDGMENT

Entered December 17, 1974

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

s/ DANA H. GALLUP
Clerk.

Enter: s/ COFFIN, Ch.J.

[cc: Messrs. Lecomte and Hawke.]

APPENDIX C

GEORGE R. WHITTEN, JR., INC., doing business as WHITTEN CORPORATION,
PLAINTIFF, APPELLANT,
v.
PADDOCK POOL BUILDERS, INC., et al.,
DEFENDANTS, APPELLEES.
No. 7381.
United States Court of Appeals,
First Circuit.
Heard Nov. 3, 1969.
Decided March 25, 1970.

John E. Lecomte, Boston, Mass., with whom Princi & Lecomte, Boston, Mass., was on brief, for appellant.

John D. Hawke, Jr., Washington, D.C., with whom Paul A. Good, Lynn, Mass., Arnold & Porter, Washington, D.C., and Butterworth & Good, Lynn, Mass., were on brief, for appellees.

Before ALDRICH, Chief Judge, McENTEE and COFFIN, Circuit Judges.

COFFIN, Circuit Judge.

This is an appeal from a summary judgment dismissing plaintiff-appellant's civil antitrust complaint. Appellant, George R. Whitten, Jr., Inc. [Whitten] is in the business of designing and manufacturing swimming pool gutters and accessory equipment and of serving as general contractor for the construction of entire swimming pool facilities. Appellees are three affiliated corporations [hereinafter, singly Paddock] [1] which engage in the same business.

[1] Paddock of California, Inc. franchises dealers with the right to use its trade names, trademarks, and patents. Paddock Pool Equipment Co., Inc. manufactures water circulation and filtration systems and other accessories for swimming pools. Paddock Pool Builders, Inc. constructs and installs swimming pools in the northeastern part of the United States, using products of Paddock Pool Equipment Co.

Both Whitten and Paddock specialize in the manufacture of prefabricated "pipeless" pool gutters, which include recirculation equipment as an integral part of the gutter assembly and thus eliminate the need for pipe buried around the perimeter of the pool. Paddock's product, the "Integral Flow Recirculation System", is patented; Whitten's basically similar product, the "Uniflow System", apparently is not.

The case arises out of the efforts of both parties to sell their products to public bodies acting under competitive bidding procedures. Whitten's complaint charges that Paddock's selling efforts have violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 and § 3 of the Clayton Act, 15 U.S.C. § 14. Specifically, counts I through III of the complaint allege that Paddock and its various dealers and representatives violated § 1 of the Sherman Act by conspiring to require the use of its own specifications in the public swimming pool industry, with the intent to exclude all others, accompanying this effort with misrepresentations regarding Whitten, and threats of litigation and harassment directed to Whitten and its present or prospective customers. Counts III-VI describe roughly the same acts as attempts to monopolize in violation of § 2 of the Sherman Act. Count VII alleges that Paddock has violated the Clayton Act by representing to public customers that they must use Paddock accessories whenever they use Paddock's patented gutter system.

During the process of taking depositions, Paddock moved for summary judgment, conceding for the purpose of the issue raised by the motion that it had combined with dealers and others to effect the use of its specifications in the public swimming pool industry, that its specifications were so drawn that only it could comply, and that its purpose was to eliminate competition. It further conceded that these

propositions "substantially embody" all of Whitten's Sherman Act allegations. The court granted the motion for summary judgment, without opinion, but in the context of briefs and argument directed to the proposition that Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) immunizes from antitrust law liability all efforts to induce governmental bodies to take action, notwithstanding the motives of the inducers. The case comes to us on the basis of the peladings, answers to interrogatories, depositions, and an affidavit.

Our standard, of course, is whether, viewing the evidence favorably to Whitten, there is any fact in dispute which could be material to resolution of the legal issue. Rogen v. Ilikon Corp., 361 F.2d 260, 266 (1st Cir. 1966). Paddock, using a perfectly proper tactic to bring sudden death to litigation which could be protracted, has conceded far more concerning its motives and techniques than any subsequent proof might establish. We judge it therefore by the following artificially stark set of facts.

The market for pipeless swimming pools is both relatively new and quickly expanding. Thus far, however, the greater initial expense of such pools has limited sales almost exclusively to public bodies or private bodies using public funds and subject to public bidding procedures. Although the number of firms supplying equipment for pipeless pools is unclear, Paddock is apparently the largest by far, doing business to some extent in all states, having at least 45 dealers, and making 20 times the installations as Whitten.

The public and quasi-public agencies who form the primary market for both Whitten and Paddock operate under a multiplicity of state and local bidding procedures, a factor which poses considerable difficulty in disposing of

this case on summary judgment.[2] Nevertheless, the following skeleton procedure seems to be common. When a public body—for example, a school board—has received the authorization to construct a pool, it retains an architect or engineer to supervise the job. He then determines what products are available and prepares the technical specifications on which bids will be based. These specifications are then submited to local authorities for clearance under health and building codes and finally to the school board. The school board, usually placing heavy reliance on the judgment of the architect, approves the specifications and invites bids. At this point, manufacturers may seek to have their products approved as equals to, or acceptable substitutes for, the equipment described in the specifications, but time is extremely short and the protests of rival suppliers are usually referred to the architect who drew up the original specifications.

Obviously, then, the original drafting of specifications is a critical stage for suppliers of pool equipment. Both Paddock and Whitten try to influence architects at this stage by publishing descriptions of their products in architectural catalogues. In addition, when Paddock learns of a forthcoming public pool project, one of its agents or dealers visits the architect charged with supervising the bidding. While Whitten also attempts to enter the scene at this early stage, its more limited resources prevent it from doing so on the same broad scale as Paddock. Paddock endeavors, with a high degree of success, to persuade the architect to adopt Paddock's own specifications. One witness deposed that "a

[2] For example, in the critical area of product and specification approval, the federal government maintains elaborate independent testing services and a system of appeals to the Comptroller General for suppliers aggrieved by decisions of the contracting authority. *See* R. Nash and J. Cibinic, Federal Procurement Law, 170-177 (1966). State and local authorities, however, sometimes delegate this function entirely to so-called "strong" architects hired to supervise a particular project.

good many architects * * * have evidently not written any specifications at all but allow Paddock to do so or used the specifications which Paddock supplied." These specifications are on their face neutral technical descriptions of generally available pool accessories, but a closer inspection reveals that they describe Paddock's products—and only those—in a variety of ways. They require that the recirculating and filtering systems be purchased from a manufacturer who has produced them for specified number of years—which only Paddock has done. Much of the equipment is described in a way that would rule out features of Whitten's equipment. The filter specification goes so far as to refer to Paddock equipment by Paddock's catalogue number. While the specifications provide for "an approved equal" for the described equipment, the specific functional or structural requirements would rule out the practicable possibility of an equal being accepted. Moreover, the time limitations on one who would submit a bid on alternative designs and equipment make such submission next to impossible.

Associated with this pressure to persuade architects to accept Paddock's proprietary and exclusionary specifications is other conduct which, under the ground rules of this case, we are to take as established. This includes falsely advertising that Paddock is the only manufacturer of pipeless swimming pool equipment and that its designs have benefitted from its national swimming program—which in fact is non-existent; false statements about Whitten's lack of experience; and threats of litigation against public bodies and contractors who have contracted with Whitten or contemplate doing so.[3]

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[3] Paddock feels that these allegations are not germane, in part because deception does not vitiate an otherwise valid *Noerr* defense, 365 U.S. at 145, 81 S.Ct. 523, and in part because Whitten has not challenged the validity of Paddock's patent. *Noerr*, apart, however,

We are therefore confronted, for the purposes of this appeal, with government acting in a proprietary capacity, purchasing goods and services to satisfy its own needs within a framework of competitive bidding, where the initial responsibility for recommending specifications has been entrusted to a hired professional, and where the selling effort directed at that professional and his public client by a leading supplier was monopolistically motivated and ran the gamut from high pressure salesmanship to fraudulent statements and threats.

[1] Paddock is willing to present its case in this posture —as it says, "The most extreme state of facts imaginable" —because of its confidence in the proposition that efforts by private parties to influence the actions of government cannot violate the antitrust laws, even though such efforts are intended to eliminate competition. In support of this proposition, Paddock advances two separate but related principles of antitrust exemption. First, drawing on Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), Paddock argues that restraints of trade which result from valid governmental action cannot give rise to private antitrust liability. Second, relying primarily on Eastern Railroad Presidents Conference v. Noerr Motor Freight, *supra,* and United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), Paddock maintains that joint efforts to influence public officials are beyond the scope of the antitrust laws.[4]

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we think systematic tale-telling coupled with other relevant factors such as conspiracy or monopoly power may constitute an antitrust violation. We also doubt whether one must as a matter of law challenge the validity of a patent in order to complain of the uses to which it is put. *Cf.* United States v. Singer Manufacturing Co., 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963).

[4] While the two doctrines are often treated as one, we agree with Paddock's separate treatment of each. The two are not coterminous. For example, an unsuccessful attempt to influence government action may fall within the *Noerr-Pennington* immunity, but not

[2] These propositions find ample support in the language of the Supreme Court opinions on which Paddock relies. None of these cases, however, addresses the factual profile presented here,[5] and we are particularly reluctant to rely on verbal formulae to solve problems of antitrust liability. The Sherman Act has been interpreted as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958). In the light of this purpose, courts in considering conspiracies to restrain trade have held that, "It is not the form of the combination or the particular means chosen but the result to be achieved that the statute condemns." American Tobacco Co. v. United States, 328 U.S. 781, 809, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946). In a similar vein, courts have condemned otherwise innocent practices if exploited to achieve or maintain monopoly power. United States v. Griffith, 334 U.S. 100, 66 S.Ct. 941, 92 L.Ed. 1236 (1948); United States v. United Shoe Machinery Corp., 110 F.Supp. 295 (D.Mass.1953), aff'd per curiam, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954). There are occasional exemptions from the rule of unfettered competition for particular forms of combination and particular kinds of anti-competitive practices, but these exemptions are narrowly construed. *Cf.* United States v. Borden

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the *Parker* immunity. Conversely, a state regulatory agency may decide to restrain competition without prompting; the beneficiaries, not having solicited government action, would enjoy a *Parker* immunity but not one based on *Noerr-Pennington*. Moreover, because of its First Amendment overtones, the *Noerr-Pennington* immunity is arguably broader than the *Parker* exemption.

[5] Paddock has cited one lower court decision, United States v. Johns-Manville Corp., 259 F.Supp. 440 (E.D. Pa. 1966), which involved substantially similar facts and raised, among others, the precise issue raised here. The court, relying on *Noerr* and *Pennington*, granted summary judgment for defendant without extended analysis. For reasons which we express in the text, we disagree with this broad application of the *Noerr-Pennington* rule.

Co., 308 U.S. 188, 196-202, 205-206, 60 S.Ct. 182, 84 L.Ed. 181 (1939); Silver v. New York Stock Exchange, 373 U.S. 341, 347-349, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 216-220, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966). With these strictures in mind, we turn to examination of the tributary doctrines on which Paddock relies for its claim of antitrust immunity.

THE PARKER v. BROWN IMMUNITY

We ask first whether the adoption of Paddock's specifications by public bodies brings Paddock within the protection of Parker v. Brown, *supra*. *Parker* grew out of the efforts of a packer or raisins to enjoin the operation of California's agricultural marketing scheme. The object of the scheme was to avoid ruinous competition by placing a certain percentage of every grower's crop within the control of a committee of growers and packers, who could then sell or withhold the produce as conditions dictated. The Supreme Court assumed that this program would violate the Sherman Act if it had been the product of private agreement. The Court, however, stressed that the program had been established under state legislation and was administered by a group appointed by the Governor and confirmed by the State Senate. In the light of these indications of deliberate government guidance, the Court concluded:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 350-351, 63 S.Ct. at 313.

[3] The Court's emphasis on the extent of the state's involvement precludes the facile conclusion that action by any public official automatically confers exemption. As one commentator has observed, the assertion that an act is "valid governmental action * * * suggests inquiry rather than ends it. * * * Generally, the underlying issue in determining the applicability of such an exemption is the degree of governmental involvement in and supervision over, the allegedly wrongful private activity." Comment, Alabama Power Company v. Alabama Electric Cooperative, Inc., 55 Va.L.Rev. 325, 345-346 (1969). Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation.

In terms of such deliberate governmental occupation of a field normally left to the free winds of competition, this case falls at the opposite end of the spectrum from *Parker*. At the *Parker* end of the spectrum lie cases like Trucking Unlimited v. California Motor Transport Co., 1967 Trade Cas., ¶ 72,-298 (N.D.Cal.1967), a case involving certification of common carriers, where the deliberate choice of a regulatory agency intervened between the private anti-competitive activity and the resulting restraint on trade, or cases like E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966), cert. denied, 385 U.S. 947, 87 S.Ct. 320, 17 L.Ed.2d 226 (1967), a suit involving an airport service franchise, where a state agency exercised broad

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[6] *See also* Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954) (state regulation of electric power lines along rights of way); Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F.2d 672 (5th Cir. 1968), cert. denied, 393 U.S. 1000, 89 S.Ct. 488, 21 L.Ed.2d 465 (1968) (conditions imposed on loan by Rural Electrification Administration); Miley v. John Hancock Mutual Life Insurance Co., 148 F.Supp. 299

authority to manage a monopoly in the public interest.[6] Even at this end of the spectrum, no exception will be found if state encouragement of price stability falls short of the delegation and approval in *Parker*. *See* Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F.Supp. 872 (D.N.J.1967); *cf.* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 561-562, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

The middle of the spectrum is occupied by cases in which the state has chosen to regulate a field, but state policy is neutral or silent with respect to restraints of trade. Since there is no conflict in such cases between state regulatory action and the policy of unfettered competition, the courts have found no difficulty in denying antitrust immunity. Northern Securities Co. v. United States, 193 U.S. 197, 347-350, 24 S.Ct. 436, 48 L.Ed. 679 (1904), cited in Parker v. Brown, *supra,* at 317 U.S. 351, 63 S.Ct. 307; Travelers Insurance Co. v. Blue Cross of Western Penn., 298 F.Supp. 1109 (W.D.Pa.1969); *cf.* Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959).

[4] In the case at bar, however, the state policy is neither anti-competitive nor neutral. When the government acts under laws requiring competitive bidding, it signifies its intent to respond to the signals of a competitive market on the same terms as any other consumer, an intent which is entirely consistent with the aims of the Sherman Act. This intent would be frustrated, and the ultimate cost to the public substantially increased, if some sellers could nevertheless engage in anti-competitive practices merely

(D. Mass. 1957), aff'd, 242 F.2d 758 (1st Cir. 1957) (state commission awarding insurance contract); Independent Taxicab Operators' Ass'n of San Francisco v. Yellow Cab Co., 278 F.Supp. 979 (N.D. Cal. 1968) (awarding taxi stand concession under state law permitting exclusive awards). For an excellent summary of the law on conflicts between federal regulatory action and the Sherman Act, *see* Northern Natural Gas Co. v. FPC, 130 U.S. App. D.C. 220, 399 F.2d 953, 959-961 (1968).

because they were dealing with the government. For example, suppose the plaintiff here was not a rival of Paddock, but a group of school boards seeking treble damages under the doctrine of Georgia v. Evans, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346 (1942). It would be anomalous to dismiss the school boards' suit on the grounds that, by adopting Paddock's specifications, they had conferred immunity on monopolistic practices which they had never considered, which they lacked the authority to approve, and which undermined the entire process of competitive bidding. We conclude, therefore, that the adoption of Paddock's specifications by public bodies does not bring Paddock within the exemption for valid governmental action.

THE NOERR-PENNINGTON IMMUNITY

Assuming that Paddock's conduct is not protected by the doctrine of Parker v. Brown, we next consider whether such conduct falls within the teaching of Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., *supra*, and United Mine Workers v. Pennington, *supra*, which hold that joint efforts to influence public officials in the pasage or enforcement of laws are beyond the scope of the antitrust laws. The basic case is *Noerr* which grew out of a dispute between railroads and truckers. The railroads mounted an intensive but misleading publicity campaign to obtain anti-trucker legislation and to persuade the governor of a state to veto a pro-trucker bill. The truckers then brought suit, charging a conspiracy in restraint of trade. The Supreme Court reversed judgments of liability on two grounds. First the Court noted that:

> "To hold that the government retains the power to act in [a] representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity,

> but political activity, a purpose which would have no basis whatever in the legislative history of the Act." 366 U.S. at 137, 81 S.Ct. at 529.

The Court then defined as "of at least equal importance" the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws," 365 U.S. at 139, 81 S.Ct. at 530, a right protected by the First Amendment. The Court added that financial self-interest was an important motive in prompting citizens to participate in government.

The key to this decision, in our opinion, is the Court's heavy emphasis on the political nature of the railroad's activities and its repeated reference to the "passage or enforcement of laws." The entire thrust of *Noerr* is aimed at insuring uninhibited access to government policy makers. A pluralistic society moves by many motives. The hope, supported by history, is that permitting every interest to be heard will produce a tolerable amalgam responsive to the needs of a given time. But the efforts of an industry leader to impose his product specifications by guile, falsity, and threats on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws. By "enforcement of laws" we understand some significant policy determination in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter. *Noerr* alone, then, does not support Paddock's position.

Noerr was followed by *Pennington*, a case involving an effort by large mine operators and union officials to persuade the Secretary of Labor to prescribe higher minimum wages for companies selling coal to the TVA on long-term contracts. This effort at persuasion would seem to fall well within the *Noerr* immunity for attempts to influence the enforcement of laws. The Walsh-Healy Act, 41 U.S.C.A. § 35 *et seq.*, conferred considerable discretion on the Secretary of Labor to set wage levels in the public interest, and re-

quired the Secretary to observe the strictures of the Administrative Procedure Act, including notice, public hearing, and judicial review, in making wage rulings. 41 U.S.C. §§ 35(b), 43a; Costilo, AntiTrust's Newest Quagmire: The Noerr-Pennington Defense, 66 Mich.L.Rev. 333, 344-345 (1967).[7] Nevertheless, the trial court instructed the jury that efforts to influence the Secretary were illegal if part of a broader conspiracy to drive small mineowners from business. Pennington v. United Mine Workers, 325 F.2d 804, 817 (6th Cir. 1963). The Court of Appeals took an even more restrictive view, holding that *Noerr* shielded only good-faith attempts to influence public officials "unaccompanied by a purpose or intent to further a conspiracy to violate a statute." 325 F.2d at 817. In rejecting these restrictive views of *Noerr,* the Supreme Court observed:

> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. 657 at 670, 85 S.Ct. 1585 at 1593, 14 L.Ed.2d 626.

Paddock seizes on this statement to buttress its position that efforts to influence any public official are exempt. In context, however, the Court's emphasis is not on the role of the public officials involved, but rather on the irrelevance of intent or conspiracy in applying the *Noerr* doctrine. Nevertheless, there remains the question of whether a particular attempt to influence a public official is the kind of political activity which *Noerr* protects.

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[7] Some have been troubled by the fact that the mineowners approached not only the Secretary of Labor, but also the TVA. *See* Note, Application of the Sherman Act to Efforts to Influence Government Action, 81 Harv.L.Rev. 847, 853 (1968). However, since the TVA had the power to undermine the Secretary's decision by making "spot market" purchases from low wage operators, the mineowners' conduct seems a reasonable addendum to the main proceedings before the Secretary.

Noerr stressed the importance of free access to public officials vested with siginificant policy-making discretion. We doubt whether the Court, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues.

We find support for our reading of *Pennington* in Continental Ore Co v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). In *Continental Ore*, a private firm acting as administrator of Canada's wartime rationing program used its discretionary power to exclude a competing processor of vanadium ore from the Canadian market. The Supreme Court, stressing that there was no evidence that the Canadian government had approved of the conduct of its agent, held that such conduct was subject to the Sherman Act. In *Pennington*, the Court was careful to distinguish *Continental Ore* on the grounds that there was no indication that any Canadian official "would have approved of joint efforts to monopolize the production and sale of manadium * * *." 381 U.S. at 671, 85 S.Ct. at 1594 n. 4. Presumably a different result would have followed if defendants in *Continental Ore*, instead of seeking to subvert the administration of the rationing program, had boldly sought a change of policy from executive or legislative officials. *See* Costilo, *op. cit.*, 66 Mich. L. Rev. at 347.[8]

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[8] Unlike Paddock, we do not read *Continental Ore* to mean that any action by a Canadian public official would have resulted in exemption. An anti-competitive practice may receive only the most cursory inspection by public officials, *see* Woods Exploration Co. v. Alcoa, 36 F.R.D. 107 (S.D. Texas 1963), or public officials may approve conduct without consideration or awareness of its anti-competitive aspects. *Cf.* Angle v. Chicago, St. Paul, Minneapolis and Omaha Rwy. Co., 151 U.S. 1, 14 S.Ct. 240, 38 L.Ed. 55 (1893). The issue in such cases is not whether the action was in form "governmental", but whether the real decision makers were public officials or private businessmen. *See* American Bar Association, 1955-1968 Antitrust Developments, 211-12 (1968).

[5] The same logic applies in this case. The state legislatures, by enacting statutes requiring public bidding, have decreed that government purchases will be made according to strictly economic criteria Paddock is free to seek legislative change in this basic policy, but until such change is secured, Paddock's dealings with officials who administer the bid statutes should be subject to the same limitations as its dealings with private consumers. Indeed, to hold otherwise might impair the effectiveness of competitive bidding. *See* Note, *op. cit.* n. 7, 81 Harv. L. Rev. at 851-852 (1968). We conclude, therefore, that the immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes.

[6-9] This conclusion does not, in our view, encroach on the freedom of speech and right to petition protected by the First Amendment. The First Amendment does not provide the same degree of protection to purely commercial activity that it does to attempt at political persuasion. *Cf.* Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942); Breard v. City of Alexandria, 341 U.S. 622, 641-643, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). Moreover, the First Amendment does not prevent government from adopting reasonable rules for regulating the conduct of those who seek its favor. United States v. Harriss, 347 U.S. 612, 625-626, 74 S.Ct. 808, 98 L.Ed. 989 (1954). Finally, Paddock's right to tout its wares to government agencies, unlike the right to seek legislation involved in Noerr, is purely a creature of statute and must be exercised within the confines of bidding procedures designed to insure the maximum possible competition for the government's expenditures. In the light of these considerations, we see no constitutional objection to requiring that Paddock observe the same limitations in dealing with the government as it would in dealing with private consumers.

Nor do we see the practical difficulties which trouble Paddock. Paddock argues that by denying immunity we cast doubt on the legality of many existing public contracts and will in the future force public bodies to forego patented products and "procure at the lowest common denominator". Paddock has, however, confused the narrow issue of whether its conduct is exempt from antitrust regulation with the broader issue of whether it has in fact violated the Sherman Act. We address only the question of exemption; we intimate no view on whether a violation has actually occurred. Paddock's conduct may on inspection prove to be the muscle flexing of a budding monopolist, or it may prove to be no more than a vigorous selling effort. Nor do we mean to condemn the publication of proprietary specifications. Such specifications undoubtedly provide a useful service to architects and engineers. We hold only that the legality of Paddock's selling methods is to be judged without regard to whether its customer is a private consumer or a public official acting under a competitive bidding statute. Those who sell to private developers under competitive bidding procedures have never enjoyed antitrust immunity. We doubt whether applying the same standard to dealings with public customers will prompt a wholesale repudiation of contracts or hamstring the efforts of public bodies to buy desirable products.[9]

On the other hand, we think that such an even-handed rule will promote the policy of free and unfettered com-

[9] Our reliance on state bidding statutes should not be taken as approval of Whitten's argument that Paddock's selling efforts fall within the Sherman Act because Paddock's specifications are illegal under state bidding statutes. State law on the validity of restrictive specifications varies widely. 63 C.J.S. Municipal Corporations § 1149: 43 Am.Jur. Public Works and Contracts §§ 16-17. We do not, therefore, equate immunity with legality under state law. Rather, we rely on bidding statutes as clear indicia that government is acting as a consumer rather than as a regulator.

petition which underlies the Sherman Act. Government is the largest single customer in our economy, with expenditures amounting to over $150 billion in 1966. Note, *op. cit.* n. 7, 81 Harv.L.Rev. at 847 n. 3. Occasionally, government may encourage activity which would otherwise violate the antitrust laws, *e.g.*, 50 U.S. C. App. § 2158, or use its purchasing power to promote broader objectives of public welfare, *e.g.*, Walsh-Healy Act, 41 U.S.C. § 35(b). In this case, however, the government bodies which Paddock sought to influence were acting under elaborate bid procedures designed to insure that purchases were based solely on economic considerations. To hold that Paddock's conduct is exempt in such circumstances would be tantamount to a grant of total immunity for commercial dealings with the government. Our national reliance on the market to efficiently allocate resources would be misplaced if dealings with the nation's largest customer were totally exempt. We therefore hold that efforts to influence government officials acting under statutes requiring competitive bidding are within the scope of the antitrust laws.

TYING AGREEMENTS

Paddock has also moved to strike those portions of the complaint in which Whitten alleges that Paddock violated § 3 of the Clayton Act and § 2 of the Sherman Act by conditioning the sale of Paddock's patented gutter system on the purchase of Paddock accessories. These allegations, if true, would certainly constitute violations of the antitrust laws. International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252, 22 L. Ed. 2d 495 (1969). Paddock, however, moved for summary judgment on the grounds that Whitten had failed to show any evidence of the illegal condition or agreement which is the gravamen of a tying offense.

As evidence of an illegal condition, Whitten relies primarily on the terms of Paddock's specifications, which as we have seen, are widely adopted by contracting authorities. This document requires that a single manufacturer supply all the elements of the water recirculation system and expresses a preference for manufacturers who can supply accessories as well as recirculation equipment. Since only Paddock can meet these terms, a contracting authority which adopts Paddock's specifications in order to obtain its gutter system will eventually purchase an entire equipment package from Paddock.

[10] In reply, Paddock argues that the specifications, whatever their restrictive effect, are not an agreement between Paddock and the contracting authority, but are instead guidelines freely adopted by the contracting authority for the use of potential bidders. In Paddock's view, the tying effect in this case results not from an illegal agreement imposed by the seller, but from the buyer's desire to insure that his bidders supply compementary equipment of high quality.[10]

[11] Whatever the ultimate merits of this argument, we must view it through the prism of summary judgment, which should be granted only when the truth is clear, when no material fact remains for trial, and when the moving party is entitled to judgment as a matter of law. Sartor

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[10] In advancing this argument, Paddock places heavy reliance on the deposition of Mr. George Whitten, president of Whitten, Inc., who admitted that he did not intend to allege that Paddock refused to sell its gutter system unless the purchaser also agreed to buy accessory equipment. This admission, however, must be qualified by Mr. Whitten's later allegation that Paddock has engaged in discriminatory pricing which had the effect of a refusal to deal. Moreover, a seller need not refuse to sell his tying product outright in order to induce purchasers to enter an illegal tying agreement; he may, for example, offer discounts for those who purchase both tying and tied products or threaten litigation against those who refuse to accept the whole package. Mr. Whitten's admission does not, therefore, dispose of the tying issue as a matter of law.

v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944). The Supreme Court has often expressed its reluctance to dispose of complex issues of economic fact through the relatively blunt tool of summary judgment. White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963); Kennedy v. Silas Mason Co., 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948). Moreover, a court has discretion to deny an otherwise justified motion for summary judgment if the arguments of the parties have failed to clarify the underlying facts, *cf.* Kennedy v. Silas Mason Co., *supra* at 256, 68 S.Ct. 1031, or if the motion is tainted with procedural unfairness. Williams v. Howard Johnson's of Washington, Inc., 323 F.2d 102, 107 (4th Cir. 1963); 6 J. Moore, Federal Practice ¶ 56.16(6).

[12] In the light of these teachings, we think that the summary judgment on the tying issue should not stand. The gist of Paddock's defense is that the restrictive specifications were not imposed by the seller, but freely adopted by the buyer. But the fact — which we must assume for purposes of summary judgment — that many contracting authorities are willing to adopt Paddock's restrictive specifications, contrary to their apparent economic interest, provides at least some basis for inferring an illegal understanding. *Cf.* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221-227, 59 S.Ct. 467, 83 L.Ed. 610 (1939). The record also contains allegations of several instances in which Paddock used threats of patent infringement litigation to persuade reluctant purchasers of the merits of its gutter system. When the "tying" product is patented, an infringment suit can be a powerful weapon in controlling the market for the unpatented "tied" products. Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 493-494, 62 S.Ct. 402, 86 L.Ed. 363 (1942). Certainly, the tying issue would appear in a very different light if buyers

regularly adopted Paddock's specifications in order to avoid litigation rather than because of the intrinsic merit of Paddock's products. Of course, unfavorable inferences about the motives of Paddock and its customers may be readily rebutted by appropriate evidence, but the arguments of counsel cannot supply the lack of such evidence in the record before us. On the basis of this scanty record, we cannot say that Paddock has conclusively dispelled the possibility of an illegal condition or understanding. Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 89 S.Ct. 1391, 22 L.Ed.2d 658 (1969).

In addition, the record on appeal reveals considerable confusion about what Paddock conceded for purposes of its motion for summary judgment. In argument before the trial court, counsel for Paddock described his motion as essentially a motion to dismiss and stated that Paddock would concede all the material facts of the complaint. Counsel immediately clarified what this concession entailed for purposes of the first issue, the *Noerr-Pennington* defense, but failed to make this meaning clear with respect to the second issue, the tying agreement. As a result, counsel for Whitten, thinking that Paddock's motion raised only legal issues, declined the trial court's offer of additional time to complete the taking of depositions. As a further result, Whitten on appeal has relied on Paddock's concession, while Paddock has argued that Whitten introduced no evidence of an illegal understanding. We do not pause to apportion blame for this confusion, nor do we hold that such misunderstandings bar summary judgment in every case. In this case, however, we have already decided that there must be a remand to consider Whitten's charges of conspiracy and attempt to monopolize. Both these allegations and the charges of illegal tying arrangements seem to turn on essentially the same facts. We therefore conclude that sensible judicial administration

requires that we give the parties additional opportunity to develop the facts relevant to the alleged tying arrangements.

The judgment granting summary judgment for the defendant is vacated and the case in remanded for proceedings not inconsistent with this opinion.

APPENDIX D

STATUTES INVOLVED

15 U.S.C. Section 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be

deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. Section 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty or a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. Section 14

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1160

GEORGE R. WHITTEN, JR., INC., DBA WHITTEN CORPORATION, *Petitioner,*

v.

PADDOCK POOL BUILDERS, INC., ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

JACK LIPSON
KENNETH A. LETZLER
1229 19th Street, N.W.
Washington, D. C. 20036
Attorneys for Respondents

Of Counsel:
ARNOLD & PORTER
Washington, D. C.

May 8, 1975

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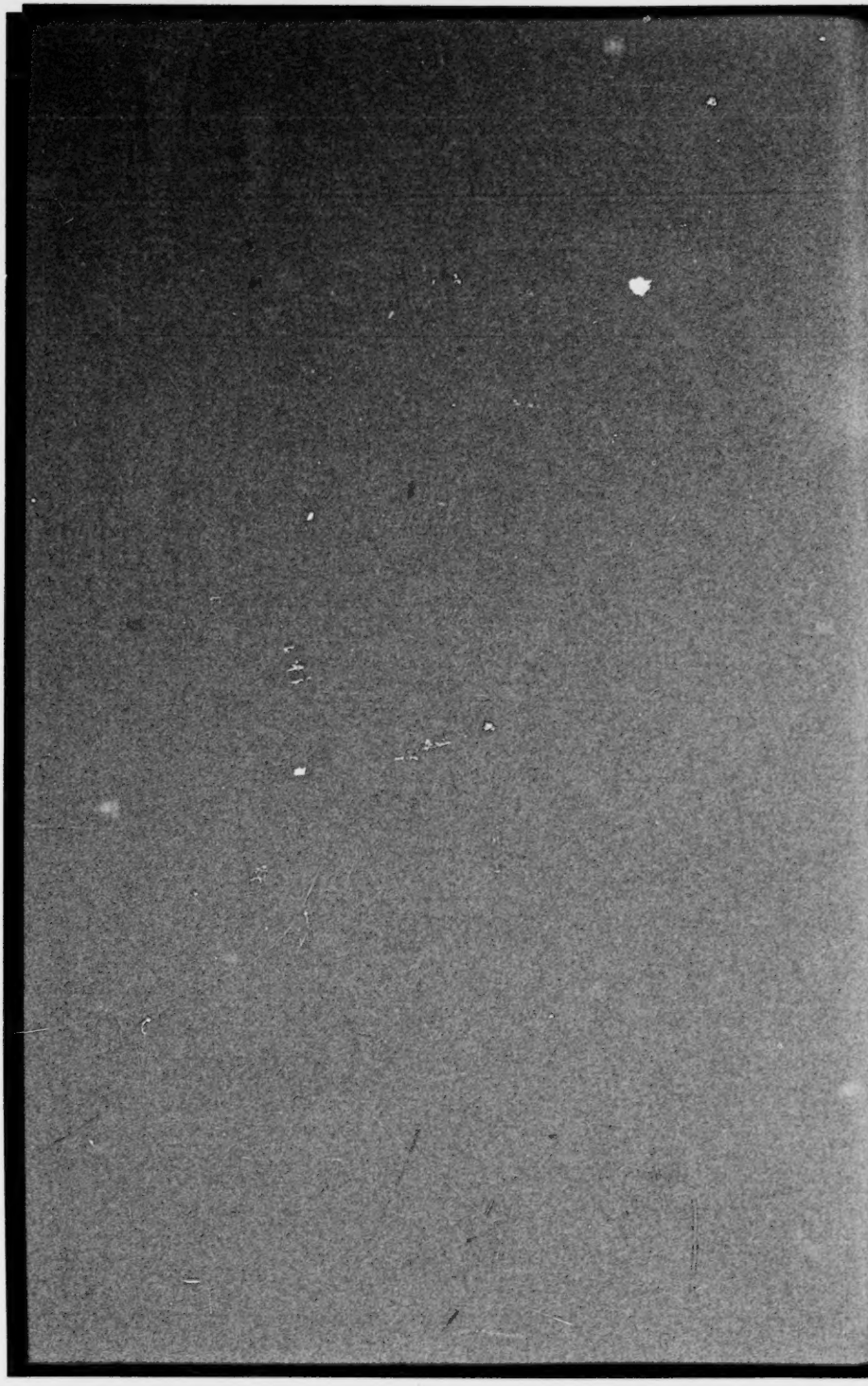

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1160

GEORGE R. WHITTEN, JR., INC., DBA WHITTEN CORPORATION, *Petitioner,*

v.

PADDOCK POOL BUILDERS, INC., ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

This brief is submitted by the respondents (referred to collectively as "Paddock") in opposition to the Petition for a Writ of Certiorari filed herein by petitioner George R. Whitten, Jr., Inc. ("Whitten").

OPINIONS BELOW

The opinion of the district court (App. A to Petition) is reported at 376 F. Supp. 125. The opinion of the Court of Appeals for the First Circuit (App. B to Petition) is reported at 508 F.2d 547.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

The complaint in this action charged the respondents with three distinct violations of the antitrust laws: First, that they had combined in restraint of trade, in violation of section 1 of the Sherman Act, by "requiring" the use of proprietary specifications, and by making misrepresentations and threats of litigation; second, that by means of the same conduct they had attempted to monopolize the "public swimming pool industry," in violation of section 2 of the Sherman Act; and, third, that they had engaged in unlawful "tying" arrangements, in violation of section 3 of the Clayton Act.

The Petition has abandoned a number of the charges set out in the complaint,[1] and the questions it purports to present bear little or no resemblance either to the original charges or to the issues litigated at trial or in the court of appeals. From the inception of this case, in 1968, the overriding issue has been whether Paddock's practice of distributing model "proprietary"

[1] The Petition raises no issues as to alleged misrepresentations, threats of litigation, or unlawful "tying" arrangements—all of which charges were found to be completely without factual foundation by both the court of appeals and the district court.

specifications,[2] which allegedly "exclude" Whitten, is lawful. At the trial, Whitten's calculation of its alleged damages consisted solely of a listing of pool projects it claimed to have lost because it was "excluded" as a result of the adoption of Paddock's specifications. In this Court, Whitten puts great emphasis on alleged "dirty tricks." At the trial, however, Whitten made no effort whatsoever to show any injury resulting from "dirty tricks," and, as the facts clearly show, it suffered no such injury. Indeed, while the court below characterized certain competitive efforts of Paddock as "distasteful," it noted that these efforts "were not demonstrably successful," and it found no harm to Whitten stemming from any such conduct of Paddock.[3] While we think it clear that Whitten's case is totally without merit, even as recast for this Court, we believe that there is only one issue properly raised by the Petition:

Whether it constitutes a restraint of trade or attempt to monopolize, violative of sections 1 or 2 of the Sherman Act, for a manufacturing and sales organization accounting for less than three percent of the relevant market to distribute for voluntary use by architects

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[2] A proprietary specification is one which identifies a desired product by manufacturer, brand name or important characteristics. It is an accepted method of specifying a desired product, particularly where special qualities are desired. Its use is recognized by such bodies as the Construction Specifications Institute and the American Institute of Architects. Indeed, the court below held that "such specifications undoubtedly provide a useful service to architects and engineers." (See App. C to the Petition at p. 102).

[3] Nothing in the court's opinion held that the promulgation of model specifications was "distasteful." In fact the record shows that such a practice is widespread and is engaged in by Whitten itself.

model construction specifications that narrowly describe its own product, where such distribution is not accompanied by coercion.

STATUTES INVOLVED

The Petition correctly indicates that the only statutes involved here are sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act. Sections 1 and 2 of the Sherman Act are set forth in Appendix D to the Petition. However, Appendix D erroneously reproduces section 3 of the Clayton Act, rather than section 4, which provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

This case was tried and decided below on a voluminous record. Whitten was accorded every opportunity to prove its charges, and in every respect the proof fell short of the allegations. During five years of pretrial, the parties engaged in substantial discovery, which included depositions of architects, engineers and public officials in eleven states. The trial itself lasted 22 days, resulting in a record of over 5,000 transcript pages of testimony and hundreds of exhibits, totaling additional thousands of pages. Altogether, the district court heard 62 witnesses; 26 in open court and 36 by depositions. Both sides fully briefed the evi-

dence and the legal issues in post-trial briefs and proposed findings of fact. The trial judge did not adopt the proposed findings of either party, but made an independent assessment of the evidence and concluded that, "Plaintiff has failed to establish by a preponderance of the evidence that the defendant has committed those violations of the antitrust statutes alleged in the complaint." (p. 54).[4] The district court's findings and conclusion were affirmed unanimously by the court of appeals.

In every respect, the resolution of this case turns on the facts proved at trial. As this Court has repeatedly recognized in antitrust cases, an appellate tribunal must give deference "to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). *Accord, United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 381 (1956); *United States* v. *Oregon Medical Society*, 343 U.S. 326, 332 (1952).

This case arises out of the efforts of two competitors, Paddock and Whitten, to market their respective designs of a prefabricated metal recirculation system for use on public swimming pools. The purpose of all swimming pool recirculation systems, irrespective of the materials from which they are constructed, is to provide a means for skimming water from the surface of a pool, passing it through a filter and chlorinator, and returning the freshly filtered and chlorinated water to the pool.

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[4] Unless otherwise indicated, page references are to the opinions below reproduced in appendices to the Petition, or to the Petition itself. "DX" or "PX" refer to Defendant's exhibits or Plaintiff's exhibits.

The Paddock organization, which is the successor in interest to the business of a company that had been engaged in the manufacture and sale of swimming pools and equipment since 1920, is comprised of three commonly-owned companies that manufacture and sell a broad line of equipment for public and residential swimming pools. As the court of appeals noted, "It is clear that the three Paddock Companies are not competitors, but rather vertically affiliated for the purpose of marketing the Paddock system." (p. 76). The Paddock recirculation system was patented in 1958 by an Ohio engineer, and was first manufactured and sold by Paddock under a license from the assignee of the patent in 1963, at a time when Whitten was not yet in existence. The relevant market for such recirculation systems, as alleged in the complaint and found by the district court, comprises the entire public swimming pool industry and includes systems made of stainless steel, galvanized steel, concrete (both pneumatically applied and poured in place), masonry, tile and other materials. Paddock's share of this market was determined to be 2.7 percent of the total. The court of appeals found that there was "vigorous competition" among suppliers of these different systems to get their products specified. (p. 67). Whitten does not challenge that conclusion in its Petition. Nor does Whitten challenge the definition of the relevant market of both courts below, or the fact that the combined sales of Paddock and Whitten in that market are less than 3 percent of the total.

Whitten was organized in 1964. Since 1966, it has been engaged solely in the business of assembling and installing its own design of a recirculation system. It completed its first installation in 1967, the year before

this litigation was commenced, and in 1968 it obtained a patent on its design. Whitten promotes and sells its system through salesmen and representatives throughout the United States. Whitten's sales volume and profits have increased substantially since it commenced business and during the pendency of this case. Its gross sales grew from $116,653 in 1965 to about $1 million in 1972.

Despite some surface similarities in the Paddock and Whitten systems—both are prefabricated of metal and both eliminate the need for buried pipe around the perimeter of a pool—the two systems differ markedly from one another in a number of material respects. The differences are substantial enough to lead many architects, engineers and buyers to prefer one to the other. As the district court found, "there are substantial differences between the two systems," and "these differences provide a basis on which a prospective buyer, or architect representing a buyer, may make an informed choice of one system over the other." (pp. 37-38). These findings are overwhelmingly supported by the evidence, and are not contested in the Petition. Whitten itself has stated that these differences make each of the systems "unique." (DX 340 at 43). Both Paddock and Whitten concentrate on these differences in their selling efforts.

Undisputed evidence establishes that when a public body decides to build a swimming pool, it will typically engage an architect to design the pool and to issue detailed construction plans and specifications. While the pool project is in the design or "concept" stage, which may last several years, the architect will usually investigate a variety of alternate designs and products, consult published sources of product information, con-

fer with various manufacturers and suppliers, conduct field investigations of different systems, and solicit budget estimates from suppliers.

One important decision for the architect during this early phase of a project will relate to the design of the pool's recirculation system. The district court found —and it is not disputed in the Petition—that the architect may elect to use any one of a wide variety of competing types of recirculation systems, each of which has unique attributes. He may choose to design a system incorporating a gutter fabricated of concrete (poured, precast, or pneumatically applied), tile, aluminum, cast stone, or galvanized, carbon or stainless steel, or he may elect to use a so-called "skimmer" system, which uses no gutter at all.

Because each pool uses only one recirculation system, competing manufacturers and suppliers—including Whitten—regard this "concept" stage of a project as the most important phase of competition in the sale of their product. For this reason, Paddock, Whitten and other competing suppliers of different systems endeavor to learn of pending projects at the earliest possible time prior to the issuance of the specifications in order to promote the use of their own product in the final design that will be put out for bid. The witnesses at trial—again including Whitten's own witnesses—unanimously agreed that the most important phase of competition is competition to "get specified," that is, competition to persuade the purchaser and its representatives to incorporate their particular type of system into the final design of the pool. Whitten does not contend, and there is no evidence, that Whitten is precluded by Paddock from communicating with architects or owners during this concept phase—or during

any other phase of the competition. Whitten concedes that architects have the opportunity to learn about Whitten's system, and to evaluate it during the concept phase.

It is common practice throughout the construction industry for suppliers to publish and distribute to architects and engineers model specifications that describe the distinctive features of their products in precise detail. Both Whitten and Paddock follow this practice. Such model specifications frequently identify the manufacturer's product by name, as in the case of both Whitten and Paddock,[5] or by catalog number. Such specifications are generally characterized as "proprietary." By their nature, the proprietary model specifications of Whitten and Paddock differ from each other since, as the district court found, the "specifications point up the fact that the systems are different." (p. 43).

The undisputed evidence establishes that architects are free to ignore such models or to draw on them to whatever extent they may wish in preparing definitive project specifications. The record contains no evidence whatsoever that architects are coerced into adopting

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[5] The record is uncontroverted that hundreds of manufacturers throughout the country distribute model specifications that describe the unique features of their products. Whitten's own model specification provides that "the gutter system shall be the 'Uniflow' system by Whitten Corporation, Bellingham, Massachusetts, as described herein." Paddock's model provides that "The system shall be Paddock of California's 'IFRS System' as manufactured by the Paddock Pool Equipment Co., Albany, New York." In addition, in each case, the unique features of the product are described in detail in the model specification.

Whitten's witnesses at trial conceded that if the Whitten model specification were adopted by an architect, the Paddock system could not qualify.

Paddock's model specifications, and Whitten concedes that such is not the case. (Trial Tr. 22-131, -132). Rather, the evidence is uncontradicted that the final specifications reflect the architect's professional judgment and the desires of his client.

These architect's specifications vary from project to project. In some, the specifications may name the products of more than one supplier as equals. Other specifications may name one product, but permit contractors to offer alternative types of recirculation systems as well. The evidence at trial showed that in many cases, the architect's specifications will describe the recirculation system of one particular manufacturer—sometimes Paddock, sometimes Whitten, and sometimes others—and in every case in which such a description is set forth, it is immediately followed by the words "or equal." It was stipulated that all specifications had an "or equal" clause which gave the architect the option to use any other system which in his professional judgment would meet his criteria. (DX 580). Expert testimony and abundant evidence in the record establish that proprietary specifications with an "or equal" clause are widely regarded by architects and engineers as opening up the widest possible competition consistent with the design criteria established for the project.

Prior to bidding, suppliers of alternate systems may apply to the architect to be approved as an "equal." The evidence shows this was often done. Even after bidding, the "or equal" specification does not foreclose competition because the successful general contractor has an economic incentive to submit a substitute system to the architect as an "equal" whenever the seller of that system offers him a lower price. The

evidence shows that this frequently occurred and that architects and their clients have gone to great lengths in evaluating such proposed substitute systems. When Whitten or Paddock has been named and the other is proffered as an "equal," some architects have concluded that the two systems are "equal," and have thus allowed either to be furnished. In other cases, however, architects have concluded that one is not the "equal" of the other, and have insisted upon being furnished with a system incorporating the unique features of the system that the architect has specified.[6]

While this litigation has focused on the confrontation in the marketplace between Paddock and Whitten, the uncontradicted evidence and the findings below showed that the market in which the two firms compete—described by Whitten as the "public swimming pool industry"—is extremely large, with sales potential far greater than either firm can hope to realize. During the six-year period covered by the case—a period in which Paddock and Whitten together installed their systems on only 800 pools—more than 27,000 public pools were constructed in the United States. Whitten's president testified that its system could potentially have been used on all of these pools, and that except for the limits of time and personnel, it would have attempted to sell its product on each of these projects.

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[6] For example, an architect in Ohio insisted on using the Whitten system that he had named in his specifications, even though the Paddock system was being offered at a lower price.

ARGUMENT

This is a case in which the decisions below turned exclusively on the facts. Whitten's claims were rejected by both the district court and the court of appeals because the evidence in the record overwhelmingly established that Paddock's practice of distributing model specifications has in no way restrained competition and that Whitten has not suffered injury because of any conduct of Paddock violative of the antitrust laws. There are no controlling issues of law involved, the resolution of which by this Court would change the results reached below on the basis of the facts of record.

Despite Whitten's repeated reference to "dirty tricks" in this Court, it did not allege and there is no evidence in the record to suggest that the adoption of model specifications—which is the basis of this Petition —is related to any such conduct. Moreover, Whitten has failed to establish by evidence that the isolated instances of "dirty tricks" caused it any injury whatever.[7]

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[7] The alleged dirty tricks consisted of only four events spread over years of vigorous competition between the parties: (1) the proffer of a Christmas gift of golf clubs to a Department of Public Works employee; (2) an advance look at Whitten's plans on the Fort Devens contract; (3) a complaint to officials of the "Scan" service that Whitten was receiving a service denied Paddock; and (4) the distribution of an allegedly false report prepared by the State University Construction Fund ("SUCF") of the State of New York. In each case the record shows that Whitten was not affected by the alleged "dirty trick." The golf clubs were not accepted and the decision on the job was made by another person; Whitten obtained the Fort Devens contract; it continued to receive the Scan service; and the trial court found that SUCF Report did not contain any misstatements of fact.

I. There Is No Important Question of Federal Law

Petitioner's contention that the adoption of model specifications conflicts with state competitive bidding statutes, and therefore gives rise to a substantial federal antitrust question, is totally without merit.

First, Whitten made no effort before the court of appeals or the district court to show that any of the specifications at issue in this case violate any state competitive bidding laws. As the court of appeals observed, state law on this subject "varies widely." (p. 102, n. 9). Specifications based on Paddock's model have never been held to violate state law. In the only instance where Whitten challenged specifications based on the Paddock model as violative of a state competitive bidding statute, Paddock's specifications were upheld under the Massachusetts bidding law.[8] Obviously, where state laws permit a public body voluntarily to adopt proprietary specifications, it cannot be argued, as Whitten does, that the adoption of such specifications constitutes "frustration" of state policy; even less that the Sherman Act should thereby be deemed violated. In fact, the use of "proprietary" specifications has long been upheld in numerous cases decided under state bidding laws. *See, e.g., State ex rel. Stamford* v. *Board of Purchase & Supplies,* 111 Conn. 147, 149 A. 410 (1930); *Hoffman* v. *Muscatine,* 212 Iowa 867, 232 N.W. 430 (1930); *Pacella* v. *Metropolitan District Commission,* 339 Mass. 338, 159 N.E. 2d 75 (1959);

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[8] This unsuccessful suit was brought by Whitten against Paddock and the City of Newton shortly after Whitten was established. The pleadings, transcript and decision in the *Newton* case were made part of the record here. (DX 37, DX 38, DX 39, DX 40, DX 41, DX 42, DX 43, DX 44).

Gerzov v. *Sweeney*, 16 N.Y.2d 206, 264 N.Y.S.2d 376 (1965); *Gamewell Co.* v. *Phoenix*, 216 F.2d 928, 934 (9th Cir. 1954). *See generally* 10 McQuillin, *Municipal Corporations* § 29.42 (3d ed. 1949).

Even if specifications calling for Paddock were deemed unlawful under state law, it does not follow that the Sherman Act has been violated. As the Ninth Circuit held in a closely analogous case, *Security Fire Door Co.* v. *County of Los Angeles*, 484 F.2d 1028, 1031 (9th Cir. 1973):

> "The competitive bid statute may well serve to limit the freedom of public purchasers to make specific choices on the basis of preference rather than cost. However, a violation of the letter or spirit of a competitive bid statute, unaccompanied by anticompetitive factors bearing upon the exercise of choice of product, does not create an antitrust problem."[9]

Since no court has ever held that the adoption of Paddock's model specifications violates any applicable competitive bidding law, and since the only decision in point sustains the propriety of such specifications under state law, petitioner's claim that the court of appeals' decision conflicts with state competitive bidding statutes is without merit.

Second, petitioner ignores the undisputed fact that the mere distribution of model "proprietary" specifica-

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[9] The Fifth Circuit has similarly concluded that "The Sherman Act is neither a lowest-responsible-bidder statute nor a panacea for all business affronts which seem to fit nowhere else." *Scranton Construction Co.* v. *Litton Industries Leasing Corp.*, 494 F.2d 778, 783 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3388 (1975).

tions is a common and accepted practice throughout the construction industry—a practice in which Whitten itself engages. In itself, the distribution of model specifications by a supplier has no competitive consequence. It is the purchaser, acting through its architects and engineers—and not the supplier hoping to sell a product—that independently determines the form of the project specifications. The uncontested evidence is that architects are free to waive, modify or amend any model offered to them—or to ignore the model entirely.[10] There is no claim whatsoever in this case, nor any evidence, that Paddock has coerced, intimidated, or bribed any architect into using its model specifications, and the court of appeals pointed out that "Whitten on remand did not succeed in showing that free choice was not exercised by architects and engineers . . . ." (p. 78, n. 19). The court correctly stated that in the absence of either a conspiracy to which those adopting the specifications are a party, or coercion by the defendant—conditions that Whitten itself concedes are not present here[11]—neither the distribution nor adoption of proprietary specifications violates the Sherman Act. This holding by the First Circuit is consistent with four other recent federal court decisions, not mentioned in the Petition, rejecting claims relating to "proprietary" specifications substantially identical to Whitten's claims in this case. *See Security Fire Door Co.* v. *County of Los Angeles*, 484 F.2d 1028 (9th

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[10] Whitten's argument that Paddock's model specifications are unreasonably "exclusionary" does not improve its position. Both courts below rejected this argument on the basis of the facts of record.

[11] See Trial Tr. 22-131, -132.

Cir. 1973);[12] *Federal Sign & Signal Corp.* v. *Bangor Punta Operations, Inc.*, 357 F. Supp. 1222 (S.D.N.Y. 1973);[13] *Kendall Elevator Co.* v. *LBC&W Associates*, 350 F. Supp. 75 (D.S.C. 1972); *McLaughlin* v. *Floyd G. Browne & Associates*, Civ. No. C 74-596 (November 5, 1974).

Third, contrary to the implicit assumption of the Petition, competitive bidding statutes do not require that specifications for public projects be drawn in such a manner as to permit *all* suppliers of a particular type of product to bid. Nor do they prohibit architects from exercising their professional judgment in establishing design or performance criteria. Wholly apart from the fact that the federal antitrust laws do not compel a public buyer to purchase products it does not want, the purpose of competitive bidding statutes is simply to

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[12] In *Security Fire Door*, it was alleged that the purchaser, the County of Los Angeles, became a "conspirator" because it adopted specifications that "intentionally and deliberately" excluded the plaintiff. The Ninth Circuit rejected the argument, saying that "a purchaser is free to choose the product he desires without rendering himself an antitrust conspirator . . . . Here the choice of product by the purchaser, Los Angeles County, was expressed in the specifications. . . . [E]ach supplier was perfectly free to tout the virtues of his particular . . . system in an effort to secure favorable specifications." 484 F.2d at 1030-31. In the instant case, where *no* claim is made that the purchasers were party to a "conspiracy," it follows *a fortiori* from *Security Fire Door* that Paddock's efforts "to secure favorable specifications" by "touting" their system does not violate the Sherman Act.

[13] In *Federal Sign*, the court said (357 F. Supp. at 1240):

> "The evidence at trial established that it was indeed standard practice in the bidding process for a manufacturer . . . to submit proposed 'specifications' which in effect amounted to a description of . . . its own device. It is also clear that governmental agencies were free to select among the proposals, and even to change their specifications . . . . I cannot find in these practices either an intent or an attempt to monopolize . . . ."

require bidding among suppliers who can satisfy the purchaser's requirements, and not to compel public bodies to be less demanding in the standards of quality or performance they set. Whitten's belief that its product is as "good" as Paddock's cannot affect the undisputed finding of the district court that there are substantial differences between the Paddock and Whitten systems that have led architects and public bodies reasonably to choose the features of one over the other.[14]

Finally, Whitten obscures the important fact that "proprietary" specifications always include an "or equal" clause that allows any other product to be offered and used, notwithstanding the fact that a particular product is named, if, in the judgment of the architect, it is the "equal" of the named product. As the Court observed in *Kendall Elevator,* 350 F. Supp. at 77, "the 'or equal' clause has been construed as not precluding others from bidding."[15] Indeed, as the evidence in this case showed, the "or equal" clause is viewed as a means of maximizing competition at and after bidding because of the incentive it offers con-

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[14] While Whitten's argument would imply that no reasonable architect could choose Paddock's system to the exclusion of Whitten's, Whitten's witnesses conceded that Whitten's own model specifications would, if adopted, exclude Paddock.

[15] Typically, an "or equal" clause will provide in part as follows (DX 140):

> "Whenever any product is specified in the Contract Documents by a reference to the name, trade name, make or catalog number of any manufacturer or supplier, the intent is not to limit competition, but to establish a standard of quality which the Architect has determined is necessary for the Project. A Contractor may at his option use any product other than that specified in the Contract Documents provided the same is approved by the Architect in accordance with the procedures set forth in subdivision B of this Section. . . ."

tractors to find equivalent products that can be supplied at a lower cost. The record establishes that the "or equal" clause opens up the "widest possible competition." [16] If Whitten fails to persuade an architect that its product is the "equal" of the product called for in the architect's specifications, it can hardly blame Paddock. As the trial court found (p. 44):

> "The burden is on the supplier who has not been specified to convince the architect that his product is equal for the purposes of the particular project. This reduces itself to a matter of salesmanship."

II. There Is No Conflict of Decisions

Petitioner argues that the decisions of the courts below are in conflict with the decisions of this Court in *Socony-Vacuum Oil Co.*,[17] *Klor's*,[18] *Fashion Originators' Guild*,[19] and *General Motors*.[20] In fact there is no conflict with any prior decision of this Court.

First, Whitten claims that under the decision in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), it should not have been required to prove that Paddock's conduct actually restrained trade or that Paddock in fact attempted to monopolize the public swimming pool market. As Whitten reads *Socony-*

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[16] See DX 311, 316B, Trial Tr. 20-125, -128 (testimony of an official of the Construction Specifications Institute and materials prepared by that body and by the American Institute of Architects).

[17] *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

[18] *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

[19] *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941).

[20] *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966).

Vacuum, it is sufficient that it showed a "combination" or "conspiracy," even if it were "nascent or abortive" and quite apart from the "immaterial" fact that it "may not have been wholly successful."

Second, Whitten claims that the courts below "rejected" the decision in *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), by requiring Whitten to show that Paddock's conduct caused "public harm or injury to competition."

Third, Whitten agrues that the decisions below conflict with holdings of this Court that concerted action to exclude another from a market is a *per se* violation of the Sherman Act.

Finally, Whitten contends that the courts below improperly "fragmentized" Whitten's proof, in violation of the holding in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

Each of the cases relied on by petitioner involved *per se* illegal Sherman Act restraints, none of which is applicable here. *Socony-Vacuum* concerned a conspiracy to fix prices by a group of defendants who accounted for 83 percent of gasoline sales in the midwestern area. 310 U.S. at 191. This Court held that such a price fixing conspiracy was *per se* illegal under the Sherman Act because price fixing is conclusively presumed to be an unreasonable restraint of trade. Similarly, *Klor's*, *Fashion Originators' Guild* and *General Motors* were concerned with *per se* illegal group boycotts. This case, however, does not involve price fixing, group boycotts or any other *per se* restraint.[21]

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[21] Despite the allegation in the complaint that defendants "regulated" prices, there was a total failure of proof of this issue at trial, and Whitten never appealed the point. No group boycott was either pleaded or proved. As noted above, Whitten's charge of illegal tying has been abandoned.

Nothing in either *Socony-Vacuum* or the other cases relied on by petitioner can be read for the proposition that all "combinations" among businessmen are illegal. Indeed, this Court has repeatedly declared that outside the area of *per se* restraints, the rule of reason prevails, and only combinations or agreements which unreasonably restrain trade are in violation of the Sherman Act. *White Motor Co.* v. *United States*, 372 U.S. 253, 261-63 (1963); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 615 (1953); *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231 (1918). *Socony-Vacuum*, *Klor's* and the other cases cited by petitioner recognize the continued validity of these principles.

Since *per se* restraints are not involved in this case, the court of appeals correctly applied the standard announced by this Court in *Board of Trade of the City of Chicago* v. *United States*, *supra*. In that case, it was held that the validity of a "Call" rule of the Board of Trade was not to be determined merely by deciding whether the rule was a combination which restrained trade, but by analyzing its effect on the business concerned, *i.e.*:

> "To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable." 246 U.S. at 238.

In *Board of Trade* this Court examined the actual effect of the "Call" rule on commerce in grain, the amount of business affected, and the effect of that rule on the purchasers of grain. On the basis of that analysis, the Court concluded that the restraint was lawful.

Accord, White Motor Co. v. *United States*, 372 U.S. at 261-63, where this Court refused to declare a contractual provision *per se* illegal in a summary judgment context on the ground that:

> "We need to know more than we do about the actual impact of these arrangements on competition. . . ." *Id.* at 263.

Precisely the same analysis was applied by the court of appeals in this case. After determining that Paddock's conduct was to be tested by the rule of reason, the First Circuit stated:

> "The dispositive element seems to us to be the effect of Paddock's actions on competition in the affected market." (p. 85).

The Petition accuses the court of appeals' opinion of being "analytically faulty" (p. 25) because, among other things, it inquired into the lack of Paddock's market power. However, the absence of any market power that would adversely affect competition is a relevant consideration in determining the reasonableness of an alleged restraint. As this Court stated in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 615 (1953),

> "our inquiry to determine reasonableness under § 1 [of the Sherman Act] must focus on 'the percentage of business controlled [and] the strength of the remaining competition . . . .'"

Inasmuch as the undisputed findings of the district court establish:

> (1) that competition was not lessened as a result of the promulgation of model specifications or any other aspect of Paddock's conduct,

(2) that the number of competitors in the market was not affected, and

(3) that competition in the market was not fixed or manipulated,

the court of appeals properly concluded that no conspiracy in violation of the Sherman Act was established.

Whitten is equally wide of the mark in asserting that error inheres in the trial court's failure to make an explicit finding on the issue of combination or conspiracy. Both courts below found that the object of the alleged combination, the distribution of model specifications, was not a restraint of trade. Given this finding, it was irrelevant whether or not a "thin" conspiracy existed between the vertically affiliated defendants, as the court of appeals found. (p. 80).

Nor is there any conflict between the decision of the court of appeals and this Court's decision in *Klor's* pertaining to proof of "public injury" in a private antitrust action. *Klor's* held that in a case involving charges of a *per se* illegal group boycott, it was improper to engraft an additional requirement that a plaintiff also prove injury to the public. In striving to fashion a conflict with that decision, petitioner ascribes to the court of appeals a ruling it never made, *i.e.*, that the court "required proof of public injury." (p. 23). Nothing in the court of appeals' opinion even hints that petitioner was required to prove public injury in addition to establishing an undue restraint of trade. *Klor's* itself recognizes that outside the area of *per se* illegality the Sherman Act only proscribes "undue" restraints and that the validity of agreements not *per*

se unlawful "depend[s] on the surrounding circumstances." 359 U.S. at 211-12.

The court of appeals clearly recognized the rule of *Klor's* that in the case of a *per se* violation no assessment of the actual effect upon the public of the challenged conduct is required "because it is assumed that the practice is inherently subversive of competition." (p. 80). What the Petition has done is to confuse the requirement that plaintiff prove an "undue" or "unreasonable" restraint with the concept of proving public injury once the unreasonable nature of a restraint is established. While neither of the courts below even raised any question as to any alleged "public injury" test, both agreed that, as a matter of the evidence, petitioner had simply failed to prove an unreasonable restraint of trade.[22]

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[22] Whitten also criticizes the courts below for requiring it to "prove the existence of . . . an attempt to monopolize" (p. 18), pointing out that section 2 of the Sherman Act also "forbids combinations and conspiracies to monopolize." (p. 19). It should be noted, however, that the section 2 counts of the complaint expressly charged an *attempt* to monopolize, and *not* a combination or conspiracy to monopolize. Whitten's argument is no more than an effort to redraft its pleadings in this Court.

In any event, the point is academic, for whether an "attempt," "combination," or "conspiracy" be alleged, the standard of section 2 is identical. *American Football League* v. *National Football League*, 205 F. Supp. 60, 64-65 (D.Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). Whitten still had to prove a specific intent on the part of Paddock to monopolize the public swimming pool market and a "dangerous probability" that actual monopolization would occur. Both courts below found that Whitten had failed to prove the requisite intent, and further found that even if Paddock were to have eliminated Whitten, its share of the market would only have increased from 2.7 percent to 3 percent. Accordingly, the evidence showed that there was no "dangerous probability" of monopolization of the market by Paddock.

In apparent recognition of the infirmity of its position under existing law, petitioner would have this Court enlarge the scope of *per se* illegality in order to strike down the Paddock organization as an unlawful "combination." On the contrary, the unchallenged findings of the district court establish that competition was not adversely affected and that Whitten itself suffered no injury whatever by virtue of any act of Paddock. This attempt to expand to area of *per se* illegality should be rejected for the following reasons:

First, the Paddock "combination" consists of three vertically integrated and commonly-owned, noncompeting companies engaged in marketing the Paddock product.[23] As the court of appeals found, "the three Paddock companies are not competitors, but rather vertically affiliated for the purpose of marketing the Paddock system." (p. 76). No decision of this Court has held it unlawful for such a unified business organization to do business through separate corporate entities.

What this case involves is an effort by Paddock and Whitten to sell their products in competition with each other—and with a host of other companies—on a job-by-job basis. The Paddock companies are, like Whitten, simply engaged in the unilateral effort to sell their product. Their sales efforts do not foreclose Whitten

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[23] Paddock of California holds and licenses the Paddock trademark. Paddock Pool Equipment Company manufactures equipment. Paddock Pool Builders is in the business of building swimming pools and installing the Paddock recirculation system. It is licensed by Paddock of California, and purchases equipment from Paddock Pool Equipment Company, among others.

from access to any market and in no way prevent Whitten from engaging in its own sales efforts. As the court of appeals said:

> "Paddock is leaving Whitten as an organization alone; it is concentrating on winning customers. Each customer is its target." (pp. 84-85).

Obviously, every time a supplier succeeds in selling its product, it "necessarily involves the exclusion of a competitor," *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978, 982 (N.D. Ill. 1949), and as the Ninth Circuit observed in *Security Fire Door, supra,* 484 F.2d at 1030:

> "Once a purchaser's choice of product has been exercised, competition is, of course, at an end."

But so long as Whitten remains free to compete with Paddock in influencing the "purchaser's choice of product"—and both courts below found that it was free to do so—it cannot base an antitrust claim on its failure to prevail in that competitive confrontation. "The antitrust laws . . . protect competition, not competitors; and stiff competition is encouraged, not condemned." *Travelers Insurance Co.* v. *Blue Cross* 481 F.2d 80, 84 (3d Cir.), *cert. denied,* 414 U.S. 1093 (1973).

Second, there is no parallel between this case in which Paddock is engaged in marketing its own product in competition with Whitten, and the collaborative conduct among competitors to fix prices and exclude other competitors from access to needed supplies, which this Court struck down in *Socony* and the anti-boycott cases, *Fashion Originators' Guild, Klor's* and

General Motors. There is no proof that any combination involving Paddock prevented Whitten from obtaining supplies or from selling its product. Nor is there any proof that architects were coerced not to specify Whitten—and Whitten conceded as much in the district court. (Trial Tr. 22-131,-132). By no stretch of the imagination can Paddock's unilateral effort to sell its own recirculation system in competition with Whitten and a host of other companies in the industry be characterized as anything analogous to a boycott.

Third, since the findings establish that the Paddock "combination" had no adverse effect on competition, no public policy would be served by declaring Paddock's activity *per se* illegal. Here too, it should be recalled that Whitten was given every conceivable opportunity to prove competitive injury, and, in the end, the evidence simply failed to support the allegations. Indeed, Whitten's own success belies the claim of any restraint of trade. From a standing start in 1966, Whitten has grown into a successful company with $1 million in sales by 1972.

The final flaw in Whitten's argument is its failure to recognize that in a private treble damage action under the antitrust laws, the claimant must establish that the alleged violation caused it to suffer injury. While it may be sufficient in a government action to establish only the existence of a conspiracy in unreasonable restraint of trade, a private claimant cannot prevail by proving a conspiracy that is "nascent or abortive," or "unsuccessful." Section 4 of the Clayton Act requires, as an essential element of the plaintiff's case, that the plaintiff both plead and prove that it in fact suffered

injury "by reason of" the antitrust violation. *See, e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 126-129 (1969); *Morning Pioneer, Inc.* v. *Bismarck Tribune Co.*, 493 F.2d 383, 387 (8th Cir.), *cert. denied*, 43 U.S.L.W. 3209 (1974). Thus, the district court was absolutely correct in stating that Whitten's burden was to establish that Paddock had restrained trade, and thereby injured Whitten.

Whitten's concluding argument that the courts below improperly "fragmentized" Whitten's proof, "in violation" of this Court's decision in *Continental Ore*,[24] is plainly misconceived. In *Continental Ore*, this Court held that it was improper for a lower court to order a directed verdict in a jury case on the basis of a *seriatim* analysis by the lower court of a number of separate episodes, since it had to be assumed for purposes of the motion that the jury might have inferred an illegal conspiracy from the totality of the challenged conduct. This, however, was a *non*-jury case, and the Trial Judge entered his own findings against Whitten after a lengthy trial on the basis of an analysis of all the evidence. In arguing that the lower court "fragmentized" its proof, Whitten is simply challenging the Trial Judge's refusal to draw a broad inference of an illegal conspiracy after a full and lengthy trial.

CONCLUSION

For the reasons set out above, respondents submit that the Petition does not raise any important issue of federal law pertaining to the promulgation of model specifications and that the decisions below are consis-

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[24] *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

tent with prior decisions of this Court. The Petition for Certiorari should be denied.

Respectfully submitted,

JACK LIPSON
KENNETH A. LETZLER
1229 19th Street, N.W.
Washington, D. C. 20036
Attorneys for Respondents

Of Counsel:

ARNOLD & PORTER
Washington, D. C.

May 8, 1975